TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 123.

THE SAND FILTRATION CORPORATION OF AMERICA, APPELLANT,

vs.

SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY, AND THOMAS E. STAGG, AND ROBERT H. MAY, GEORGE E. JEKYLL, AND ARTHUR D. JEKYLL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 8, 1907.

(20,782.)

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1 In the Court of Appeals of the District of Columbia.

No. 1746.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
vs.
SAMUEL P. COWARDIN ET AL.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia ss:*

No. 24167. Equity.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, and SYDNEY P. CLAY, Defendants.

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:

Petition for Rule on Receiver.

Filed March 13, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

No. 24167. Equity.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, and SYDNEY P. CLAY, Defendants.

The petition of Samuel P. Cowardin, James F. Bradley, Sydney P. Clay and Thomas E. Stagg, parties to the above cause, show to the court as follows:

First. Your petitioners compose the firm of Cowardin, Bradley, Clay and Company, who obtained the contract from the United States Government for the construction of the filtration plant
2 as shown in the record of this cause and dated the 6th day of April, 1903.

Second. At the date of the filing of the original bill in this cause, Robert H. May, George E. Jekyll and Arthur B. Jekyll, trading

under the firm name of May and Jekyll, who had made a contract with your petitioners to do the work covered by their said contract with the United States Government, had announced their wish to be relieved from their said contract, and a contract between your petitioners and Henry B. Dean, trading as Dean and Shibley, was in negotiation to take up the said work where the said firm of May and Jekyll desired to discontinue it; and, as will appear by the record in this case, John D. Maclennan was appointed receiver herein for your petitioners' said firm, and as such receiver was authorized to and did conclude a contract with the said Dean, representing himself and a proposed future corporation to be known as the Sand Filtration Corporation of America, which said contract was thereafter, by the authority of this court, duly executed by the said receiver and the said Dean, and the said corporation was thereafter duly formed and was substituted for the said Dean in said contract, all of which will more fully appear by reference to the contract between said Maclennan, receiver, and the said Dean, dated the 25th day of August, 1903, with which contract is also filed of record in this cause an agreement between petitioners and the said firm of May and Jekyll, under date of August 25th, 1903, both of which contracts and agreements are prayed to be read as a part of this petition.

Third. Shortly prior to the institution of this suit, on to wit, August 25th, 1903, the said May and Jekyll, had entered into an agreement with petitioners for the cancellation of their original contract, dated May 26th, 1903, and subsequent to the execution of the said contract of August 25th, but on the same day, the petitioners entered into a contract with Dean and Shibley, in effect employing them to complete the work remaining unperformed by the said firm of May and Jekyll, both of which contracts are filed with the report of the said receiver Maclennan, in this cause, bearing date the — day of —— and prayed to be read as a part hereof. Under the contract of August 25th, 1903, with May and Jekyll, in the fifth paragraph thereof, as will be seen by reference thereto, the petitioners agreed to pay to May and Jekyll the sum of $8,000.00 out of any net profits which petitioners might realize from the construction or erection of that portion of the filtration plant which they had contracted to construct or erect with the United Sates Government under their said contract of April 6th, 1903; and in the said contract bearing the same date, but executed subsequently, between the petitioners and the said Dean, the latter for himslf and the said Sand Filtration Corporation when organized, assumed payment of the said $8,000.00, and also contracted to pay to the petitioners the sum of $65,000.00 to be paid out of the instalments on account of said construction which were to be paid by the United States Government under the said original contract, as is more fully set out in the said fourth paragraph of the contract between
3 the petitioners and Dean, trading as Dean and Shibley, as above set forth. Thereafter, the receiver in this cause, by authority of this court therein, entered into a contract with the said Dean acting for himself and the said future proposed corporation,

bearing date the 27th day of August, 1903, a copy of which is also contained in the record in this cause, and prayed to be read as a part hereof, in the fourth paragraph of which last-named contract the said Dean was required to deduct from the amounts paid by the United States Government, as the work progressed under him and his said future corporation, the amounts which he and it were to pay to or for the benefit of Cowardin, Bradley, Clay and Company as provided by the said contract of August 25th, 1903, namely the said sum of $65,000.00 for the benefit of the said Cowardin, Bradley, Clay and Company; and the said sum of $8,000.00 which they were under obligation to pay to May and Jekyll under their contract of the same date with the said last-named firm, if they realize a profit out of their said contract with the United States Government, and by a supplemental contract between the respondents and the said Dean, dated August 27th, 1903, a copy of which is attached hereto and prayed to be read as a part hereof, the said receiver was authorized to deduct from the money paid to him by the Government as the said work progressed, and in the instalments specified in the contract between respondents and Dean of August 25th, 1903, as aforesaid, the said sum of $65,000.00 and $8,000.00 and to pay the same directly to your petitioners instead of first paying them to the said Dean, acting on behalf of himself and his said future corporation, and then receiving them back from said Dean or said future corporation, as had been apparently provided by the said contract of August 25th, 1903.

Fourth. Your petitioners show to the court that the work covered by their contract with the United States Government was accepted by said Government as finished and completed on or about the — day of January, 1906, and full payment therefor was made by the United States Government to the said receiver on or about the — day of January, 1906. Out of the instalments paid by the Government prior to the final payment, the said receiver has paid to your petitioners $45,000.00 on account of said $65,000.00 which was so to be paid to them, and, out of the said final payment, he has paid them the sum of $10,000.00, but still holds in his hands the remaining $10,000.00, of the said $65,000.00, and also the said $8,000.00 which was to be paid to May and Jekyll in the event of petitioners realizing a profit under said contract as set forth in their said contract with May and Jekyll, of August 25th, 1903, which said amounts of $10,000.00 and $8,000.00 the receiver has failed and refused to pay to your petitioners, though thereunto frequently requested.

Fifth. The petitioners are informed and believe, and therefore aver, that the said refusal of the receiver to pay the two amounts of $10,000.00 and $8,000.00 above referred to is because the Sand Filtration Corporation has objected to the said payments on the following grounds:

4 (*a*) The Sand Filtration Corporation not having completed the work covered by its contract within the contract time, applied to the United States Government for an extension of said time, which extension the said Government declined to grant

except upon terms that the Fidelity and Guaranty Company of Baltimore, which was the surety upon the petitioners' original contract for said work, would consent, which consent said Surety Company declined to give except upon terms of the payment of a further premium of $500.00, which further premium or bonus the Sand Filtration corporation paid to the said Surety Company in order to obtain the said extension. The said Sand Filtration Corporation now claims, as the petitioners are informed and believe, and therefore, that this $500.00 should be deducted from the said $10,000.00 remaining to be paid to your petitioners out of the $65,000.00, notwithstanding the fact that the necessity for the said payment arose through failure of the Sand Filtration Corporation to carry out its contract with the receiver within the time limit fixed by the said contract and the fact that the said payment to said Surety Company, if proper to be made at all, which your petitioners have all along denied, was occasioned by such default on the part of the said Sand Filtration Corporation.

(*b*) The objection by the Filtration Corporation to the payment of the said $8,000.00, upon which objection the receiver is refusing to pay the same, as your petitioners are informed and believe and therefore aver, is based upon two grounds, namely: (1) That, in the transfer of its assets by the said May & Jekyll Company to your petitioners, and in the contemporaneous transfer by them to the said Dean of the said assets, there was a duplication in the schedule of mules, constituting part of the said assets, amounting to $1,190.00, the said assets being less in value to that extent than was represented by the said May and Jekyll at the time of the said transfer, as is claimed by the said Sand Filtration Corporation, which Corporation thereupon claims that the said duplicated amount of assets should be deducted from the said $10,000.00; and, (2) The said Sand Filtration Company Corporation further claims that the $8,000.00 was not to be paid under the terms of the contract of August 25th, 1903, between the said firm of May and Jekyll and these petitioners and the contemporaneous contract of the same date between these petitioners and the said Dean, unless the petitioners realized a profit from their sand contract with the United States Government, and, as is contended by the said Sand Filtration Corporation, unless the said Dean or the said Company, also, realize a profit from the said contract, which latter contingency it claims has not occurred, the said work having been completed by it at a loss, as it alleges and as these petitioners believe to be true. On the other hand, the $55,000.00 thus far paid by the receiver to these petitioners, and the remaining $10,000.00 yet to be paid them under the said agreement or contract, entirely, if not altogether, was a profit realized by these petitioners out of their said contract with the United States Government, and said May and Jekyll claim that, under their contract with these petitioners, they are entitled to the said
5 $8,000.00, which position or contention these petitioners are not able to deny, unless the Sand Filtration Corporation is correct in its contention that May and Jekyll do not receive the said

$8,000.00 unless the said Dean and the said Sand Filtration Corporation shall realize a profit out of the said prosecution of the work.

Sixth. As your peticioners are advised and believe, and therefore aver, the construction of the said contracts of August 25th, 1903, contended for by the said Sand Filtration Corporation is wholly untenable, and constitute no colorable ground upon which the receiver should refuse to pay over either the said $10,000.00 or the said $8,000.00; and that the only colorable ground for the receiver not to pay over to your petitioners any part of either of the said sums is the contention in regard to the said item of $1,190.00, growing out of the alleged duplication in the schedule of assets above stated. In respect to this item, your petitioners are unable to state whether such duplication in fact occurred or not, and as they are advised and believe, and therefore aver, it is a matter in which they are not particularly interested, since, if such duplication did occur, and a deduction therefore is proper to be made, as claimed, such deduction should be made from the $8,000.00 which May and Jekyll claim to be due them, so that the deduction, whether allowed or disallowed, will not affect the right of your petitioners to an immediate payment to them of their said $10,000.00, now in the hands of the receiver.

Seventh. Your petitioners have repeatedly requested that the said receiver should file his report in this cause, setting out the contentions of the Sand Filtration Corporation, and praying the instructions of this court as to his duty in the premises with respect to the payment now as aforesaid held up by him, but he has thus far failed and refused to do so. His said refusal, as your petitioners are further informed, advised and believe, arise wholly from the said contentions of the said Sand Filtration Corporation, and their insistence that the said receiver, in his said report and application for instructions, should state that these petitioners have realized no profits from their said contract with the Government, which allegation, as they are informed and believe and therefore aver, the receiver has been unable to make, and has yet been unwilling to assert the contrary in view of the position of the Sand Filtration Corporation in that regard, and your petitioners are accordingly compelled to make this application to the court for such action as may properly authorize and require said receiver to make payment to them of the said amounts so held by him.

Wherefore, and because they are without other adequate remedy, your petitioners pray as follows:

1. That a rule may be issued by this honorable court against the said John D. Macfarlan, the receiver herein appointed, requiring him to show cause on or before a day to be by the court fixed, why he should not pay to the petitioners the $10,000.00 in his hands, to which they are entitled under the said hereinbefore-mentioned contracts and agreements, and why he should not pay to them the
6 further sum of $8,000.00 which, under the said agreements, they are to receive for the benefit of the said May and Jekyll.

2. That a rule may further be served upon the said May and Jekyll, and upon the said Sand Filtration Corporation to show cause,

if any they have, and if they so desire, why the said receiver should, or should not, make payments of the said sum of $10,000.00 and $8,000.00 for the benefit of your said petitioners and the said May and Jekyll respectively, and that the cause may be referred to the auditor, or to an Examiner in Chancery, to take testimony as to any disputed questions of fact, if necessary, which may be raised by the answers of the said receiver, the said May and Jekyll and the said Sand Filtration Corporation, to said rule.

3. That the said receiver being now at Palm Beach, Florida, and the said Sand Filtration Corporation being no longer engaged in carrying on business in the District of Columbia, having their principal offices in Providence, Rhode Island, the court may by its order direct the manner in which the said rule or rules or such other order or orders as it may pass, upon consideration of this petition, may be served upon the said receiver and the said Sand Filtration Corporation. The said May and Jekyll, also, are non-residents of the District of Columbia, but your petitioners are informed, believe, and therefore aver, have counsel resident in the District of Columbia who is authorized and willing to accept service, and to make answer in their behalf.

4. That your petitioners may have such other and further relief as the nature of the case may require.

S. P. COWARDIN,
THOS. E. STAGG,
S. P. CLAY,
JAMES F. BRADLEY.
Per J. J. DARLINGTON,
His *Solicitor.*

J. J. DARLINGTON,
Sol. for Petitioners.

STATE OF VIRGINIA, *County of Henrico, ss:*

I, S. P. Cowardin, on oath say that I am one of the above-named petitioners, and make this affidavit on behalf of myself and my co-petitioners therein named; that I have read the said foregoing petition and know the contents thereof, that the allegations therein set forth as of my personal knowledge are true, and that those set forth upon information and belief I believe to be true.

S. P. COWARDIN.

Subscribed and sworn to before me this 6th day of March, A. D. 1906.

S. P. JONES,
[SEAL.] *Notary Public.*

My commission expires M'ch 31, 1906.

Under the laws of Virginia no tax is charged on this seal.

S. P. J.

7 *Rule to Show Cause.*

Filed March 13, 1906.

In the Supreme Court of the District of Columbia.

No. 24167. Equity.

THOMAS E. STAGG
vs.
SAMUEL P. COWARDIN ET AL.

Upon consideration of the petition of the complainant and the defendants in the above-entitled cause, this day filed, it is by the court this 13th day of March, A. D. 1906, ordered that John D. Maclennan, the Receiver herein appointed, Robert H. May, George E. Jekyll and Arthur B. Jekyll, trading as May & Jekyll, and the Sand Filtration Corporation, show cause, on or before the 23rd day of March, A. D., 1906, at ten o'clock, A. M. why an order should not be passed in this cause requiring the said John D. Maclennan, Receiver, to pay to the firm of Cowardin, Bradley, Clay & Company the sum of Ten thousand dollars ($10,000.00) and to the firm of May & Jekyll the sum of Eight thousand dollars, ($8,000.00) out of the moneys received by said Receiver from the United States Government as final payment on the Filtration Plant contract; provided that within two days from the date hereof, copies of this order be mailed, by registered letter, respectively, to John D. Maclennan, Palm Beach, Florida, and to the Sand Filtration Corporation, Providence Rhode Island, and provided that service of a copy hereof be accepted by the said firm of May and Jekyll, either personally or through counsel.

HARRY M. CLABAUGH,
Chief Justice.

Service of copy of above rule accepted this 13th day of March, 1906.

TUCKER & KENYON,
Sol's for May & Jekyll.

Answer of John D. Maclennan.

Filed April 2, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 24167.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN ET AL., Defendants.

Answer of John D. Maclennan, Receiver, to the rule to show cause issued in this cause on the 13th day of March, 1906, upon the
8 petition of Samuel P. Cowardin, James B. Bradley, Sidney P. Clay and Thomas E. Stagg.

For answer to said rule to show cause, this respondent answering said petition says:

1–4. He admits the averments of the first, second, third and fourth paragraphs of said petition to be substantially correct.

5–6. He admits that there is in his hands, as Receiver, as aforesaid, the sum of $18,000.00, made up of the two amounts of $10,000.00 and $78,000.00, respectively, referred to in said fifth paragraph. He admits also that he has retained said sums because of objections made to his paying out the same by counsel for the Sand Filtration Corporation of America. He is advised that it is not necessary for him to state in full the contentions of said Filtration Corporation in this regard, because he is advised that the claims of said Sand Filtration Corporation will be fully set forth in their answer to said rule to show cause.

7. This respondent admits that he has been requested several times by the petitioners, or their counsel, to file a report in this case, setting out the contentions of the Sand Filtration Corporation of America in regard to said sums of $8,000.00 and $10,000.00, respectively, and praying this Court for instructions in the premises, and he admits that he has not filed any such report. He avers, however, that for several weeks he was diligently engaged in endeavoring to frame such a report, so that the same would be satisfactory to counsel for all the parties in interest, and that in the end he found that it was impossible for said counsel to agree and he was, therefore, advised that it was proper for him to allow the questions involved to be raised before the Court by the respective parties in such manner as they, or their counsel might deem proper. He now, as at all times, holds said sums of money subject to the order of the court, and has not paid out the same, because there was a contention, in regard to it, and he was advised that that being so, it was his duty to protect the rights of all parties by retaining the money until the differences between them should be determined by the court.

JNO. D. MACLENNAN.

I, John D. Maclennan, on oath say that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated of my own knowledge are true and that those stated as upon information and belief, I believe to be true.

JNO. D. MACLENNAN.

Subscribed and sworn to before me this 2nd day of April, A. D., 1906.

WILLIAM K. QUINTER,
Notary Public, D. C.

[SEAL.]

9 *Answer of Robert H. May, George E. Jekyll, and Arthur B. Jekyll.*

Filed April 2, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court for Said District.

In Equity. No. 24167.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN ET AL., Defendants.

Answering the rule heretofore laid upon them to show cause, if any they have, why the receiver in the above entitled cause should, or should not, make payment to them of the sum of eight thousand dollars ($8,000.00) mentioned in the petition of said defendants for said rule, these respondents, Robert H. May, George E. Jekyll and Arthur B. Jekyll, trading under the firm name of May and Jekyll, respectfully show unto the Court as follows, to wit:

1. These respondents know of no reason why said sum of eight thousand dollars ($8000) should not be paid to them, but on the contrary aver and insist that said sum is rightfully due and owing to them and should be paid to them forthwith out of the moneys retained in the hand of said receiver.

2. Specifically answering section (*b*) of paragraph five of the petition for said rule, which is the only part or portion of said petition which these respondents are advised it is necessary for them to answer, these respondents aver that they know of no duplication of assets such as is alleged in said section and paragraph, and they further aver that even if there were such duplication, which they hereby expressly deny, that that would afford no ground whatever for the failure or refusal of said receiver to pay to these respondents the said sum of eight *hundred* dollars ($8000) out of the moneys in his hands, in that by the terms of the contract between these respondents and said defendants, Cowardin, Bradley, Clay and Company, of August 25th, 1903, their obligation to pay said sum of eight thousand dollars ($8000) to these respondents was expressly recognized and conditioned only upon their making a net profit out of

the Sand Filtration contract with the Government, which net profit sufficient to pay said claim they now admit was made by them; and that said contract was in effect and in law an account stated between said defendants Cowardin, Bradley, Clay and Company and these respondents. These respondents, further answering said section and paragraph, aver that under the circumstances surrounding the making of said contract of August 25th, 1903, even if there had been such duplication of assets (which these respondents again expressly deny), by such duplication the said defendants, Cowardin, Bradley, Clay and Company were in no wise damnified and suffered no possible loss thereby and it would be unjust and inequitable by reason thereof to make any deduction from said sum of eight thousand dollars ($8000) justly due and owing as aforesaid to these respondents. So far as any other of the parties to this cause are concerned there was and is absolutely no privity of contract or otherwise between them and these respondents.

3. Further answering, these respondents aver that said eight thousand dollars ($8000) was by the terms of said contract of August 23rd, 1903, to be paid by said Cowardin, Bradley, Clay and Company to these respondents conditioned only upon the making of a net profit by said defendants from said Sand Filtration contract, the making of which net profit sufficient to pay said claim is admitted by said defendants; and was not in any way conditioned upon the making of net profit from said contract by any other person or persons or corporation whatever.

4. These respondents, while expressly denying that there is any reason whatever why said eight thousand dollars ($8000) should not be paid to them forthwith by said receiver, consent to the reference of this cause to the Auditor or to an examiner in chancery to take testimony upon any disputed question of fact, if there should be any, and if the Court may think it necessary and expedient that such reference should be made. They also request leave to answer any contention antagonistic to their interests which may be made in any answer to said rule which may be filed by any parties to this cause before or after the coming in of this answer to said rule.

ROBERT H. MAY,
GEORGE E. JEKYLL,
ARTHUR B. JEKYLL,
Respondents,
By C. C. TUCKER, *Their Att'y.*

TUCKER & KENYON.
Solicitors for Respondents.

Answer of Filtration Corporation of America.

Filed April 2, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 24167.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN ET AL., Defendants.

Answer of The Sand Filtration Corporation of America to the rule to show cause issued herein on the 13th day of March, 1906, upon the petition of Samuel P. Cowardin, James B. Bradley, Sidney P. Clay and Thomas E. Stagg.

For answer to said rule to show cause this respondent answering said petition says:

1–4. It admits to be true the averments of the first, second,
11 third and fourth paragraphs of said petition, except that while it is advised that the petitioners have correctly set forth the substance of the several written agreements referred to in said petition, so far as the same is material, out of abundant caution they refer to said agreements, or copies thereof, on file in this case, and make them a part of this answer.

5. It admits that the Receiver in this case holds the amounts of $10,000.00 and $8,000.00, respectively, and that said Receiver has declined to pay the same to the petitioners, because this respondent has notified said Receiver that it objects to such payment. So far as respondent's objection applies to the sum of $500.00, a premium paid by it, the objection made by this respondent is correctly set forth in said petition.

As to the sum of $8,000.00 in said fifth paragraph of said petition referred to, it is true that the respondent has objected to the payment of the same by said Receiver to the petitioners upon two grounds: (1) That there was a duplication in the schedule of mules constituting part of the assets referred to in said paragraph amounting to $1190.00; and, (2) That under the terms of the contract of August 25th, 1903, between the petitioners and Henry B. Dean, doing business under the firm name of Dean and Shibley (to the rights and liabilities of which firm the respondent has succeeded) and under the contract of the same date between the petitioners and the firm of May and Jekyll, the petitioners are not entitled to said sum of $8,000.00.

Further answering said fifth paragraph of said petition, this respondent avers the fact to be that no profits were realized from the construction or erection of that portion of the filtration plant referred to in said petition, which the petitioners contracted with the United States to construct or erect. After said contract of August

25th, 1903, were entered into, the work under said contract was finished by said Dean, or by this respondent, as his successor, at a loss of not less than one hundred thousand dollars. If the sum of $65,000.00, which by the terms of said contract of August 25th, 1903, between the petitioners and said Dean, had been wholly retained by said Dean, or by this respondent as his successor, their loss in carrying out said contract would still be more than $8,000.00.

This respondent is advised and avers that under these circumstances there is no liability on the part of the petitioners to pay to the firm of May and Jekyll said sum of $8,000.00, or any part thereof; and further they are advised and aver that even if the petitioners be required by the true construction of their contract of August 25th, 1903, with said May and Jekyll to pay said sum of $8,000.00 to said May and Jekyll, neither said Dean, nor this respondent, as his successor, is required to pay said sum, or any part thereof, to the petitioners.

The respondent further avers that it is true that in turning over the assets of said firm of May and Jekyll, through the petitioners to this respondent, by inadvertence, there was a duplication of assets of the value of $1190.00, and they are advised and aver that this being so, the respondent is entitled to have that sum paid to it by the Receiver out of the money which would otherwise be payable to the petitioners.

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Further answering said fifth paragraph of the petition the respondent is advised and avers that if by the true construction of the contracts hereinabove referred to, the petitioners are required to pay said sum of $8,000.00 to said firm of May and Jekyll, and this respondent is not required to pay said sum of $8,000.00, or any part thereof, to the petitioners, then said sum of $8,000.00 should be paid out of the sum of $10,000.00 referred to in said petition, held by said Receiver, over and above said sum of $8,000.00, and that therefore, it is necessary that said Receiver should retain in his hands both the said sum of $10,000.00 and said sum of $8,000.00, until the final determination of the matters so in dispute.

6. As to the sixth paragraph of said petition, the respondent says that it sets forth only matters of law which this respondent is not required to answer and that the position of the respondent in regard to said questions is sufficiently indicated in its answer to the preceding paragraph.

7. On information and belief, the respondent admits that the petitioners on several occasions have requested the Receiver in this case to file his report, setting out the contentions of this respondent, and praying the instruction of the court as to his duty in the premises, and they further admit that said Receiver has not filed any such report. But partly upon information and belief, and partly upon personal knowledge, the respondent avers that said Receiver in good faith, by consultation with counsel for the respective parties in interest, has endeavored to have said counsel agree upon a statement of facts to be included in his report, which would fully and fairly show their respective contentions, and that after much correspondence between, and conferences with, counsel

for the respective parties no agreement was reached, and said Receiver was, therefore, unable to carry out his intentions in that regard.

THE SAND FILTRATION CORPORATION OF AMERICA,
By JNO. G. HANRAHAN, *Treasurer.*

A. S. WORTHINGTON,
Solicitor for the Sand Filtration Corporation of America.

I, John G. Hanrahan, Treasurer of The Sand Filtration Corporation of America, on oath say that I have read the foregoing answer signed by me as Treasurer of said Company, and know the contents thereof; that the facts therein stated of my personal knowledge are true and that those stated as upon information and belief, I believe to be true.

JNO. G. HANRAHAN.

13 Subscribed and sworn to before me this 2nd day of April, A. D., 1906.

[SEAL.] WILLIAM K. QUINTER,
Notary Public, D. C.

Stipulation.

Filed April 2, 1906.

In the Supreme Court of the District of Columbia.

No. 24167. Equity.

THOMAS E. STAGG
vs.
SAMUEL P. COWARDIN ET AL.

It appearing that no copies of the agreement between Cowardin, Bradley, Clay and Company and May and Jekyll, of the 25th day of August 1903, or the agreement between Cowardin, Bradley, Clay & Company and Henry B. Dean of the 25th day of August, A. D., 1903, or the supplemental agreement between the last named parties of August 27, 1903, are on file in the above-entitled cause, as assumed in the petition for a rule on the Receiver filed therein and the answers thereto, it is hereby stipulated that the copies of the said several instruments hereto annexed, marked, respectively, Exhibits A, B and C, shall be filed in said cause, and may be read, referred to and considered as evidence therein for the purposes of the said petition and of the proceedings thereunder.

J. J. DARLINGTON,
Sol. for Cowardin, Bradley, Clay & Stagg.
MAY & JEKYLL,
By TUCKER & KENYON,
Their Sol'rs.
A. S. WORTHINGTON,
Sol. for Sand Filtration Company of America.

Exhibit B.

Filed April 2, 1906.

Contract to Sell Construction Plant Located upon the Filter Plant in Construction in the District of Columbia and to Make Divers Arrangements in such Connection.

Whereas the co-partnership of Cowardin, Bradley, Clay and Company, composed as hereinafter stated, holds the certain contract entered into under date of April 6th, 1903, between said co-partnership and Lieutenant-Colonel A. M. Miller, of the United States Army, acting in behalf of the United States for excavation and other
14 work upon the filter plant, now being constructed in the District of Columbia, to filter the water supply of the City of Washington and vicinity;

And whereas, said co-partnership has acquired and now owns the divers articles of construction plant specified in schedule A hereto attached and made part hereof and referred to for full contents and particulars; which construction plant was acquired through May and Jekyll, who were employed by said Cowardin, Bradley, Clay and Company to do the excavation and other work aforesaid in a written memorandum of agreement dated May 26th, 1903, and also through certain trustees mentioned in said memorandum of agreement; and said construction plant and the several articles constituting the same are subject only to the obligations of the said May and Jekyll specified in Schedule B hereto attached and made part hereof and referred to for full contents and particulars, and are subject to a certain chattel trust to secure said indebtedness and are subject to no other lien, incumbrance or claim whatsoever.

And whereas, said Cowardin, Bradley, Clay and Company are financially unable to proceed with their contract aforesaid with the United States, and are otherwise in a condition warranting the appointment of a receiver to wind up the affairs of the said firm and to carry out and perform said contract.

And whereas, the said firm of Cowardin, Bradley, Clay and Company have entered into a contract with May and Jekyll, dated August 25th, 1903, whereby the contract theretofore existing between the two said firms has been cancelled and discharged and certain other rights and obligations have been created by the said contract, which the grantees are by this instrument to assume.

And whereas, the said co-partnership of Dean and Shibley, composed as hereinafter stated, are interested in the formation of the Sand Filtration Company of America, now about to be incorporated and organized under the laws of Virginia, and are desirous for said contemplated corporation to acquire the construction plant aforesaid upon condition that said corporation, or until it be formed, said co-partnership, be employed and engaged to do the excavation and other work remaining to be done to complete the contract aforesaid with the United States; and said Cowardin, Bradley, Clay and Com-

pany deem it to be for their best interests and for the best interests of all concerned that such an arrangement should be made with the Receiver, should one be appoint-

Now therefore know all men by these presents: That Samuel P. Cowardin, James F. Bradley, Sidney P. Clay and Thomas E. Stagg, now composing the co-partnership aforesaid, doing business under the firm and name of Cowardin, Bradley, Clay and Company, hereinafter designated the grantors, party hereto of the first part, in consideration of the undertakings, engagements and requirements hereinafter contained, do hereby bargain, sell and agree to sell, to Henry B. Dean, doing business under the firm and name of Dean and Shibley, hereinafter designated the grantee, party hereto of the second part all and singular the articles of the construction plant specified in Schedule A aforesaid and also all and singular all other
15 construction plant and property required by the grantors from the said May and Jekyll and also from the Trustees named in the memorandum of agreement with May and Jekyll, dated May the 26th, 1903, located upon or near the place where the excavation and other work aforesaid is being done in the District of Columbia, and also all rights, contracts and franchises and easements appertaining hereto and in whatsoever way required, for the consideration and upon the terms and conditions and subject to the agreements restrictions and limitations following, that is to say:

First. The foregoing sale and agreement to sell shall take effect only when and if, within twenty days after the date hereof, John D. Maclennan of Cleveland, Ohio, or some other suitable person or persons satisfactory to the grantee shall be appointed receiver of Cowardin, Bradley, Clay and Company by and in an order of a court of competent jurisdiction, which order shall authorize the prosecution and completion by the receiver of the work under the contract aforesaid, with the United States, and shall also authorize the employment and engagement by the Receiver of the said The Sand Filtration Company of America or, pending its organization, of said grantee, upon terms and conditions consistent with this contract to sell; and if such receiver with such authority is not appointed within such time, this contract to sell and all its parts and provisions shall be null and void without obligation or duty, liability or right of one party towards or against the other.

Second. If, within said time, said receiver shall be so appointed, with such authority, then, as soon as practicable after his appointment, a contract shall be made between him as such receiver and the said The Sand Filtration Company of America, or pending its organization with the grantee, in which said receiver shall employ and engage said company, or, during such interim, the grantee, and said company, or the grantee shall undertake, engage, and agree to perform, carry out and complete the contract aforesaid with the United States in accordance with the terms and conditions of the said contract and the drawings, plans and specifications herein referred to, subject only to changes which may be made pursuant to said contract, which hire and employment shall be for and in consideration of the payment by such receiver to said company, or pending its organization, to the grantee or all sums which are and shall become

payable by the United States or any officer thereof, for work done and materials furnished pursuant to said contract, after deducting from such payments such amounts as shall be required to pay the costs and expenses, and necessary outlay incident to the receivership and the cause in which the receiver shall be appointed. And upon the condition aforesaid that said receiver be appointed with such authority, the grantee now hereby promises and agrees that said, The Sand Filtration Company of America, or, pending its organization, the said grantee, shall and will make and enter into said agreement with said receiver, to do, perform and complete said work including the payment of all claims for labor and material, and shall and will also give bond for the faithful performance thereof in the penal sum of $150,000 with a solvent
16 surety company as surety thereon; said bond and surety to be approved by the court appointing said receiver.

Third. Upon the execution of such contract with the receiver and the execution and approval of such bond to secure the performance thereof, title to the construction plant aforesaid shall at once pass to and vest in the grantee for said The Sand Filtration Company of America, and shall be transferred to said company as soon as it is organized and capable of receiving the same; the possession of such construction plant and every part thereof shall be delivered immediately to the grantee, or said company, and the grantee or said company may, with such force as may be necessary take possession and hold the same.

Fourth. As consideration for the construction plant by this instrument acquired by the grantee, or The Sand Filtration Company of America, the grantee until the said The Sand Filtration Company of America has been organized and substituted and thereafter the said last named company, assume and agree to pay all the debts of May and Jekyll specified in Schedule B hereto attached and — a part hereof, when and as they or it may arrange with the several creditors, and in general to comply with the provisions and conditions of one certain agreement entered into between the grantors and said May and Jekyll, a copy of which is hereto attached and to be read as a part hereof, including among other provisions the payment of the sum of $8000 to the said May and Jekyll as in said agreement is provided, and the payment of which is also assumed by the said grantee; and also to pay to the receiver the sum of $65,000, to be distributed thereafter as the court may direct, which said sum of $65,000 shall become due and payable as follows: the sum of $10,000 on September 15th, 1903, $15,000 on January 15th, 1904, $10,000 on March 15th, 1904, $10,000 on May 15th, 1904, and the remaining $20,000 on the completion of the said filtration plant and at the time of the final payment thereon by the United States; and the said grantee, and the Sand Filtration Company of America, when said company shall have been substituted for the said grantee, shall also pay to the grantors or their attorney for them the sum of $3,517.50—said sum having been paid by the grantors on account of pay roll and other expenses since the commencement of negotiation between the parties hereto, and

further to pay all other expenses and obligations necessary to be incurred between the date of this contract and the execution of the formal contract with the receiver hereafter to be appointed for the grantors.

It is further agreed that all expenses, costs and fees of receivership and of the cause in which the receiver is appointed are to be borne by the grantors, or to be defrayed by the receiver out of the funds which may come into his hands for them.

Fifth. The grantors warrant their title to all and singular the articles of construction plant enumerated in schedule A and they further warrant that said articles and every thereof are free and clear of all liens, encumbrances and claims and charges of every kind and description, excepting only the debts enumerated in Schedule
17 B, and the chattel trust securing the same; and the grantors further represent, covenant and agree that all of the indebtedness of said firm of Cowardin, Bradley, Clay and Company which may come against the receivership thereof, excepting the items comprising the sum of $3,517.50 above provided for, do not exceed in amount the sum of $65,000.

Sixth. It is understood and agreed that in making this contract, the grantee acts for said The Sand Filtration Company of America, and as its representative solely until it shall be incorporated and organized and shall assume the obligations hereof and that he, said grantee, shall not be liable or responsible in any manner, to any extent, or, for anything whatsoever after said The Sand Filtration Company of America shall have been so incorporated and organized and shall have assumed the obligations hereof and of the contract to be made with the receiver as herein provided; and shall give a substituted bond for the performance thereof; It being the intention that after such incorporation, organization and assumption, this contract to sell shall have the same effect as though made directly with said The Sand Filtration Company of America in the place of the grantee above named.

Seventh. The grantors further covenant and agree to protect, indemnify and save harmless the grantee or The Sand Filtration Company of America when the said company shall have been substituted for the said grantee, from any and all loss or injury, damage or liability that may result to him or it from the fact that Michael Kelly, one of the parties to the original contract with the Government of the United States of date April 6th, 1903, is not a party to this instrument.

In witness whereof the parties aforesaid have signed and sealed these presents in duplicate in the City of Washington, District of Columbia, on this 25th day of August, 1903.

S. P. COWARDIN,
JAMES F. BRADLEY,
SYDNEY P. CLAY,
THOMAS E. STAGG,
Grantors.

HENRY B. DEAN,
Trading under Firm Name of Dean and Shibley, Grantee.

EXHIBIT C.

Filed April 2, 1906.

Whereas in the agreement between Cowardin, Bradley, Clay and Company of the first part and Henry B. Dean of the second part, bearing date the 25th day of August, 1903, and in the accompanying paper certain stipulations are contained which are apparently capable of inconsistent constructions to remedy which and more perfectly express the true intent and meaning of the said parties, this supplemental agreement is made, it is hereby fully agreed as follows:

18 1. That the Receiver is authorized to deduct from the moneys paid to him by the Government as the work progresses, and in instalments as specified in the said agreement between the parties, the sum of $65,000 and the sum of $8,000 therein mentioned, paying the same directly to the parties of the first part, instead of first paying to the parties of the second part and then receiving them back from the parties of the second part as is apparently provided in the said agreement of August 25th.

2. The sum of $3,517.50 provided in said agreement to be paid by the party of the second part to the parties of the first part, or their attorney, should be paid in cash, and simultaneously with the execution of the contract between the Receiver and the party of the second part provided for in said agreement of August 25th, 1903.

3. That if the Receiver's certificates shall be issued by an order of the court they shall specify on their face that neither of the parties of the first part nor their individual property or assets as distinguished from their partnership assets shall be in any manner liable for the payment of the said Receiver's certificates.

In witness whereof the parties hereto have hereunto set their hands and seals in duplicate this 27th day of August, 1903.

(Signed) SAMUEL P. COWARDIN,
JAMES F. BRADLEY,
SYDNEY P. CLAY,
Parties of the First Part.

——— ———,
Party of the Second Part.

EXHIBIT B ATTACHED TO RECEIVER'S REPORT.

Filed February 8, 1904.

This contract, made and entered into this 27th day of August, 1903, by and between John D. Maclennan, Receiver of Cowardin, Bradley, Clay and Company, hereinafter called the Receiver, party of the first part and Henry B. Dean, doing business as Dean & Shibley, party of the second part,

Witnesseth: That, pursuant to authority conferred by the certain order of the Supreme Court of the District of Columbia, made and

entered on August —, 1903, in the cause in equity wherein Thomas E. Stagg, is plaintiff and Samuel P. Cowardin and others are defendants, wherein said John D. Maclennan was appointed by said court Receiver of said Cowardin, Bradley, Clay and Company, the Receiver hereby hires, employs and engages said Henry B. Dean, trading under said firm and name of Dean & Shibley, until the Sand Filtration Company of America shall be organized and shall assume this Agreement and give bond as hereinafter provided and thereafter said Company and said Henry B. Dean, until said Company shall be organized and shall assume this Agreement and give such bond, and thereafter The Sand Filtration Company of America, accept such employment, and engage and undertake to furnish all materi-
19 als and labor and do all things, and also to provide and pay for all construction plant necessary and proper to complete and fully perform the certain contract, dated, April 6th, 1903, between Lieutenant Colonel A. M. Miller of the United States Army acting for the United States and the co-partnership of Cowardin, Bradley, Clay and Company, relating to excavation and other work upon the filter plant now being constructed in the District of Columbia to filter the water supply of the City of Washington, and vicinity, and so to complete and fully perform said contract in strict accordance with the requirements thereof, and the drawings, plans and specifications therein referred to: which hiring employment, engagement and undertaking are for the consideration and upon the terms and conditions following, that is to say:

First. The work shall be carried on, and all labor and materials done and furnished, under the inspection and approval provided for in said contract with the United States, a copy of which, marked Exhibit "A" is hereto attached and made a part hereof and referred to for full contents and particulars; and the decision of the officer in charge shall have the same effect and shall be complied with to the same extent as in said contract provided and prescribed.

Second. If and when said The Sand Filtration Company of America shall be incorporated and organized and shall assume this contract and give bond to secure the performance thereof, said Henry B. Dean shall be deemed to be acting solely as the representative and in interests of said Company, and shall be absolved and released from further duty, obligation or liability hereunder, and said Company shall be fully substituted in the place of said Dean and be bound hereby in the same way and to the same extent as though it were now the original party hereto of the second part; and the phrase "party hereto of the second part" shall be so construed as to designate said Dean until such full assumption hereof by said Company, and thereafter to designate said Company.

Third. The party hereto of the second part shall pay all debts and liabilities incurred for materials or labor, shall provide an adequate construction plant to do the work, shall pay therefor and shall keep the work and every part thereof clear of debts, liens and incumbrances.

Fourth. For all labor and materials furnished and to be furnished, and all services, acts, and things rendered, done and performed by

the party of the second part to complete and perform this contract and the contract aforesaid with the United States, said party shall be entitled to receive, and the Receiver shall pay to said party the amounts which the Receiver shall receive from time to time from the United States under and pursuant to the contract aforesaid with the United States from which amounts paid by the United States, however, the Receiver shall deduct the amounts to be paid to or for the benefit of Cowardin, Bradley, Clay and Company, as provided for in the certain Contract to Sell, dated August 25th, 1903, between said Cowardin, Bradley, Clay and Company and the party hereto of the second part. And to assist the party of the second part in such work by providing and furnishing the evidences of the
20 amounts of labor, materials and construction plant furnished from time to time in excess of the amounts payable and paid from time to time by the Receiver to the party of the second part, and to assure as far as practicable the payments of such excess amounts, said Receiver shall execute and deliver to the party of the second part certificates payable to order or bearer charging such excess amounts upon all the assets and effects of the Receivership, excepting the sum of Sixty-five thousand Dollars ($65,000) or any part of it and the other amounts specified to be paid by said party hereto of the second part to or for the benefit of said Cowardin, Bradley, Clay and Company to the Contract to Sell aforesaid, which amounts and obligations and every part thereof shall at all times be wholly free and clear of any lien, charge or claim, created under or pursuant to this contract, and cost incident to preparing, executing, issuing and cancelling such certificates and also shall pay and satisfy all compensation and commissions of said Receiver; the said Cowardin, Bradley, Clay and Company being hereby absolved from all liability therefor.

Fifth. Said Henry B. Dean shall within five days hereafter give bond for the faithful and full performance of this contract in the sum of One hundred and fifty thousand Dollars ($150,000) with a surety company or companies to be approved by the Court; which bond shall be cancelled when said The Sand Filtration Company of America shall give bond of like tenor and effect and covering the same time, in the same amount and with a surety company or companies approved by the court.

In witness whereof, said parties have signed and sealed these presents this 27th day of August, 1903, the approval having been first had and obtained.

——. [SEAL.]
——. [SEAL.]
——. [SEAL.]

Decree.

Filed April 3, 1906.

In the Supreme Court of the District of Columbia.

No. 24167.

THOMAS E. STAGG
vs.
SAMUEL P. COWARDIN ET AL.

This cause coming on to be heard upon the petition of Samuel P. Cowardin, James F. Bradley, Sydney P. Clay and Thomas E. Stagg for a rule upon John D. Maclennan, Receiver, The Sand Filtration Corporation of America, and Robert H. May, George E. Jekyll and Arthur B. Jekyll, trading under the firm name of May and Jekyll, to show cause why the said Receiver should not pay
21 to the said petitioners the sum of Ten thousand dollars ($10,000) balance of the Sixty-five thousand dollars ($65,000) to which they are entitled under the contract between said Receiver and said Sand Filtration Corporation, appearing of record in this cause, and why the said Receiver should not, further, pay to the petitioners, or to May and Jekyll, the Eight thousand dollars ($8,000) also referred to in said contract, and the said cause having been duly heard upon the said petition and the answers thereto of the said Sand Filtration Corporation and the said May and Jekyll; having been argued by the solicitors for the said parties, respectively, and duly considered, it is thereupon by the Court this 3rd day of April, A. D., 1906, adjudged, ordered and decreed that the said Receiver do forthwith pay to said petitioners, or to their solicitor of record, Eight thousand dollars ($8,000) out of the said sum of Ten thousand dollars ($10,000) claimed by them to be due under the said contract, reserving the remaining Two thousand dollars ($2,000) thereof subject to the court's further order upon the coming in of the Auditor's report upon the reference hereinafter directed.

And, it appearing to the court that the petitioners have derived a profit under their contract with the United States Government from the construction of the filtration plant, within the intent and meaning of the contract between them and the firm of May and Jekyll of August 25, 1903, but the Court being unable, in the present state of the record, to determine the question whether there was an error of $1190 arising from a duplication in the schedule of the assets of the May and Jekyll Company by them turned over to the petitioners, and by the latter to the Sand Filtration Corporation as claimed by said corporation, so that a final decree can not be made at this time, it is thereupon by the court ordered that this cause be, and the same hereby is, referred to the Auditor of the Court to take such testimony as may be adduced before him by the parties in respect thereto, and to submit the same with his report

thereon, and, also, upon the expense of the receivership as early as may be practicable so to do.

HARRY M. CLABAUGH,
Chief Justice.

Auditor's Report.

Filed August 2, 1906.

In the Supreme Court of the District of Columbia.

Equity. No. 24167.

THOMAS E. STAGG
vs.
SAMUEL P. COWARDIN ET AL.

This cause is referred to me to take testimony and report whether there was an error of $1190 arising from a duplication in the
22 schedule of the assets of the May and Jekyll Company, by them turned over to the petitioners, Samuel P. Cowardin and others, and by them to the Sand Filtration Corporation, as claimed by the said corporation; also to report on the expenses of the receivership. After due notice I proceeded with the reference.

The firm of Cowardin, Bradley, Clay & Co., who will be hereafter referred to as the Cowardin Company were contractors for supplying the labor and materials for the construction of the Filtration Plant for the City of Washington, under a contract dated April 6th, 1903. On the 26th of May 1903, the said company entered into a contract with parties doing business under the firm name and style of May and Jekyll, by which the last named firm were employed by the Cowardin Company to provide all the work, labor and material necessary to complete the contract, together with a plan adequate to enable them to do so, and proceed with and finish the said Filtration Plant under the contract of the Cowardin Company. May and Jekyll undertook and agreed to assume and pay certain existing obligations incurred by said Cowardin Company as described in a certain schedule annexed to said contract.

May and Jekyll further agreed to pay over to Joseph J. Darlington and Charles Towles Tucker, Trustees, the sum of $50,000 to be expended in the purchase of a plant to be purchased in the name of the said trustees, and used for the purpose of carrying out said contract with the United States. It further provided that the said plant should consist of certain articles and implements already purchased or contracted for by the Cowardin Company and set forth and described in another certain schedule annexed to said agreement and marked B, and such additional implements and articles as might be selected by the said May and Jekyll.

Among the articles enumerated in Schedule B of the said agreement, I find an item of

"Wheel scrapers, $1,873.92"

and another item as follows:

"Mules (50 at $191.97 each) $9,598.50."

These wheel scrapers and mules formed a part of the plant which was purchased by the trustees in accordance with the agreement.

In another portion of the same schedule there appears a list of amounts due on account of said plant, among which I find, as due for wheel scrapers, three notes each for the sum of $383.00, bearing date May 1st, 1903 and payable in one, two and three months the notes aggregating $1149.00. Other amounts due on account of plant as set forth in the said schedule, were for mules purchased by the Cowardin Company and delivered as part of the plant referred to in the agreement. All the parties seem to have proceeded under the said agreement until the 25th of August 1903, when a new contract was made between the partners of the Cowardin Company and the firm of May and Jekyll by which the agreement of May 26th 1903 was cancelled, and it was declared that all of the obligations of the parties thereto, to each other were finally discharged.

The Cowardin Company agreed to assume themselves, and
23 to procure the assumption by any other parties who might undertake to complete the contract with the United States, of all the debts and liabilities of the said May and Jekyll as set forth in a schedule annexed to the said agreement and marked Schedule A.

In consideration of the obligations assumed by the Cowardin Company, May and Jekyll by the said agreement, transferred to the said Cowardin Company all of the right, title and interest of May and Jekyll in and to all contracts etc. and in and to all the articles of personal property on the site of the Filtration Plant, and agreed to procure from the trustees, Darlington and Tucker, a bill of sale of that portion of the said articles, the title to which was vested in the said trustees, a schedule of all of the said articles of personal property being attached to the agreement and marked Schedule B. In the latter schedule there appears the following item, "Live stock $1,142.46." Note: The words, "Live stock" are printed in type and the following is in writing in parenthesis, "50 mules." This writing, as now appears, was inserted by one of the trustees holding the title to the plant which had been transferred to them by the Cowardin Company under the agreement of May 26th 1903 and was only intended to identify the animals received by the trustees or for which they were accountable.

On the said 25th of August the Cowardin Company entered into an agreement with Dean and Shibley by which the latter undertook the completion of the work under the contract with the United States and to pay the obligations then existing, and the Cowardin Company agreed to deliver or cause to be delivered all the articles of personal property making up the plant used in the said construction at that date, and identified these articles in a schedule marked B attached to the agreement of August 25th between the Cowardin Company, and May and Jekyll, the obligations assumed by Dean and Shibley being identified as the list contained in Schedule A attached to the same agreement.

Dean and Shibley, as stated in their agreement, acted for a cor-

poration about to be organized, or then in process of organization, known as the Sand Filtration Company, now a party to this proceeding, and with the understanding and agreement of all parties that all the rights and obligations assumed by Dean and Shibley should be assumed by the said organization when organized, which was subsequently done.

The answer of the said corporation to the petition of Cowardin and others asserts that in the transfer of the plant to Dean and Shibley, as set forth in Schedule B to the agreement of August 25th, there was charged as the cost of mules the sum of $1190 which had already been charged in the cost or price of the wheel scrapers, set forth in the same schedule.

The books of account of May and Jekyll were called for by counsel representing the said Sand Filtration Company and were not produced for reasons appearing in the response of counsel to the call.

A ledger account kept and used by the Cowardin Company in the preparation and prosecution of the contract work on the
24 Filtration Plant, was produced and filed in connection with the testimony of the witness Price, who testified as an expert accountant. He states that he was employed by the Sand Filtration Corporation at the time of the transfer of the contract and plant to that company, and subsequently kept their books and accounts, which, however, are not produced here and perhaps are not material to this issue.

In the Cowardin Company ledger on page 2 I find what is entitled "Wheel Scraper Account" in which an entry appears under date April 18 of the purchase of 40 wheel scrapers from the Austin Manufacturing Company and another purchase of 13 wheel scrapers. On page 253 of that ledger I find the Austin Manufacturing account credited with the purchase of the first mentioned wheel scrapers and charged with three notes amounting to $1149. On page 5 I find a Bills Payable account which is credited by the amount of the three notes with which the Austin Manufacturing Company is charged. The Austin Manufacturing Company account is closed on the ledger by the payment of the balance in cash.

On page 6 of the ledger I find Mule Account, which shows the purchase of mules by the Cowardin Company to the amount of over $20,000 in addition to which $500 is charged for freight paid for transportation of the mules. A credit to this account shows a transfer to May and Jekyll of $9598.50 leaving a balance of debits unsettled. I will have occasion to refer to the form and entries of these accounts in a later part of this report.

The witness who testifies as an expert accountant states from recollection that in the books kept by May and Jekyll the three notes given to the Austin Manufacturing Company in payment for wheel scrapers were charged in a mule account, but on examination the witness is unable to state with any definiteness the form of the said entry in words or figures, and this testimony is the only proof tending to show that the amount of these notes was charged to the mule account, unless some additional proof be found either in the documents on file or the book entries which are in evidence. So far as the

books of the Cowardin Company shed any light upon the question it would seem that there was no confusion of the two accounts, mules and wheel scrapers, by reason of which through accident or mistake an item belonging to one should be charged or entered in the other, the accounts were in no respect related to each other nor had the notes in question any relation to the mule account.

The notes themselves were payable to a firm not dealing in live stock of any kind but known to contractors as extensive manufacturers of wheel scrapers and articles of like class. Again the sum of these notes alone does not account for the difference between the price affixed to the mules in the inventory of May and that of August by about $300.

Another fact from which presumption may be drawn is the difference between the aggregate of the plant inventory of May and that of August. The schedule of property transferred in May by the Cowardin Company to May and Jekyll aggregates $15,659.79 while the inventory of the property transferred to the Cowardin
25 Company and by that Company to Dean and Shibley aggregate $101,651.10 showing the acquirement by May and Jekyll during the three months of their operation of a very considerable quantity and variety of equipment and material necessary for and used in the prosecution of their work.

It is also significant in this connection that in the schedule of May the mules are described definitely as to number and kind while in the schedule of August the animals are described under the generic term of live stock and the price stated in the aggregate.

It is not unreasonable to assume that during the period of May and Jekyll's operation the live stock would be increased not alone in the class of mules but by other animals. At the time of the original transfer by the Cowardin Company to May and Jekyll the former had on hand a considerable number of mules in excess of those then transferred and I find in an account against May and Jekyll on the Cowardin Company's ledger before referred to, charges against that firm after the date of the transfer of over $2,000 in amount the items not definitely given.

It is somewhat remarkable that the witness referred to whose expert ability and service was pledged to the interests of his employers failed to bring the alleged error or over-charge to their attention when first discovered as he states. He testified to his very close connection with the inventories and transfers of August 25th. The books of both the Cowardin Company and May and Jekyll were for all needed purposes in his possession or subject to his examination at will. In and as a part of that transfer appear the difference in the price or cost affixed to the item of mules in the one and live stock in the other, both of which according to his testimony he understood to relate to mules. The notes in question had all matured and evidently had been paid by someone, either the Cowardin Company who were the makers or May and Jekyll whose liability was created by the agreement of May 26, so that the duplication or error or whatever it may be termed if existing at any time had been made before the 25th of August 1903.

There is one more condition to consider in this connection. There

is always a reasonable presumption that business men and corporations dealing with each other especially where the transactions are made with deliberation and reduced to documentary form with elaboration and detail are fully alive to their own interests and careful to examine the prominent items of detail which go to make up the agreement of transfer or other arrangement. So if the live stock entered in the agreement of August 25th was entered at excessive rates it would seem that the parties contracting for sale and purchase both being engaged in a business calculated to make them thoroughly conversant with the values of such property, it would be fair to presume that the alleged error would have been then and there discovered and corrected.

While it is possible that some of the apparent inconsistencies between the testimony and the obvious conditions appearing in the history of this case might have been explained, I am compelled to deal with the evidence as I find it and in view of the indefinite
26 character of the oral testimony submitted in support of the averment of overcharge and duplication, the presumptions afforded by acknowledged facts and conditions and the lapse of time since the alleged discovery of the error, I have to report as my finding that the alleged duplication in the schedule of the assets of the May and Jekyll Company turned over to the Cowardin Company and by them to the Sand Filtration Corporation is not sufficiently established in proof and that the alleged error of $1190 or $1149 was not made.

I am also directed to report on the expenses of the receivership. I return herewith the testimony of the receiver with a statement of his claim being made up of items of hotel and travelling expenses, telephone service, cost of bond and the expenses of a certain Mr. Hull in travel to Washington in relation to the bond, also an account of a firm of attorneys for legal services.

There are several objections to this claim as presented with the testimony of the receiver. The necessity for travelling and hotel expenses is not definitely shown to be chargeable to the receivership. On the contrary they appear to have been incurred in the interest and at the instance of the Sand Filtration Company in dealing with the departmental authorities at Washington. No dates appear in the claim filed nor are they definitely fixed by the testimony. The same objection applies to the expenses of telephone service.

As to the claim for reimbursement of cost of the bond, this is a claim which under the practice of the Court could not be allowed, but is to be covered by the compensation of the receiver and clearly the expenses paid to some agent or representative of the Bonding Company for travelling to Washington to arrange the bond could not in any view of the case be allowed.

As to the legal services for which a claim is made they are not shown to be at all connected with the duty or service of the receiver under his appointment.

These several expenses as appears from the testimony of the receiver have been paid by the Sand Filtration Corporation or by Dean and Shibley and I have to report upon the proof and the conditions appearing in the order of appointment and in the agreements

of the parties that the receiver is not entitled to reimbursement of the amount of these claims or either of them from the fund available in the cause or from the Cowardin Company.

JAS. G. PAYNE, *Auditor.*

Auditor's fee	$50.00
Cost of testimony	48.00
	$98.00

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STAGG
vs.
COWARDIN.

FRIDAY, *May* 11, 1906—10 a. m.

Hearing pursuant to notice.

Present: Mr. Tucker and Mr. Darlington.

Owing to the illness of Mr. Worthington, an adjournment was taken until Saturday, May 19, 1906, at 10:30 a. m.

* * * * * * *

STAGG
vs.
COWARDIN.

THURSDAY, *May* 31, 1906—11 a. m.

Hearing pursuant to notice.

Present: Messrs. Tucker and Huidekoper for May and Jekyll, Mr. Frailey for the Sand Filtration Corporation of America and Mr. J. J. Darlington for Cowardin Bradley Clay and Company also Mr. Stagg.

Mr. HARRY PRICE having been sworn testified as follows:

By Mr. FRAILEY:

Q. What is your residence?

A. Worcester, Massachusetts.

Q. What is your profession?

A. Manager for the Auditing Company of New York.

Q. What is the character of business done by the Auditing Company of New York?

A. Expert accounting.

Q. Do you know the Sand Filtration Corporation of America, were you ever employed by them in any way?

A. Yes.

Q. When were you employed by them.

A. At various times since their origin, January 1, 1904.

Q. Prior to the organization of the Sand Filtration Corporation were you employed by any of the parties interested in the Filtration plant in Washington?

A. I was employed by Dean and Shibley and arrived in Washington to take charge of the work at the Filtration plant August 29, 1903.

Q. What kind of work were you employed to do at the plant here?

A. To verify the inventories of material and supplies in the Filtration plant schedule which was handed me by Dean and Shibley and to open up a set of books and inaugurate a system of accounting for the continuance of the building of the filtration plant.

Q. Now, do you remember when the plant was turned over by Messrs. May and Jekyll to the Sand Filtration Corporation or rather to Dean and Shibley?

A. August 29, 1903.

Q. Well, do you remember whether it was May and Jekyll or Cowardin Bradley Clay and Company, that Messrs. Dean and Shibley got the plant — ?

A. No.

28 Q. It was?

A. I don't know from whom they got the plant, I——

Q. After Messrs. Dean and Shibley had the Filtration plant, and afterwards the Sand Filtration Corporation, did you have anything to do with the books or accounts of the Sand Filtration Corporation?

A. Yes, I have audited them regularly ever since they were opened, at irregular intervals.

Q. In that matter, did you at any time make any examination of the books of Cowardin Bradley Clay and Company and the books of May and Jekyll?

A. Immediately after taking the inventory as of August 29, 1903, I went to the books of Cowardin Bradley Clay Company and May and Jekyll and proved that inventory as to both quantity and values.

Q. What if any error or over-charge or anything of that kind with reference to mules, did you discover?

Mr. TUCKER: I object on the ground that the rights of Messrs. May and Jekyll are fixed by the contract of August 25, 1903 as between themselves and Messrs. Cowardin Bradley Clay and Company and no error in the method of bookkeeping on the part of either May and Jekyll or Cowardin Bradley Clay and Company can in any way affect the rights of May and Jekyll under such contract or properly require any deduction from the amount due them at this time namely $8,000, and, further on the ground that the books referred to are the best evidence upon the subject.

Mr. FRAILEY: I withdraw that question.

Q. Did you find any error in reference to mule accounts in your examination of these various books and verifying the inventory and schedule you have testified to?

Mr. TUCKER: I repeat my objection above stated.

Mr. DARLINGTON: On behalf of Cowardin Bradley Clay Company I reserve a similar objection to the proof, if the objection of May and Jekyll shall be held to be meritorious, and further that the

rights of Cowardin Bradley and Clay Company cannot be affected by a contemporaneous oral agreement.

The AUDITOR: The ruling is reserved.

A. Yes.

Q. I show you a book Mr. Price, and ask you in the first place where you got that book?

A. I first saw that book in the office of the Filtration plant when I took charge there.

Q. In Washington?

A. Yes.

Q. When you came down to that office in whose charge was that office at that time?

A. A bookkeeper employed by May and Jekyll.

It is stipulated that all questions propounded to this witness relating to the books of account of May and Jekyll and Cowardin Bradley Clay Company shall be admitted to be objected to on the ground heretofore stated without the necessity of repeating such objection.

Q. Among what books and papers was it found?

29 Mr. DARLINGTON: I object as calling for a simple conclusion of opinion of the witness as to the character of the papers among which the book was found.

The AUDITOR: The objection is sustained.

Q. You stated it was in the office of May and Jekyll?

A. Yes.

Q. In charge of one of their bookkeepers?

A. Yes.

Q. Have you any further knowledge as to what this book is?

A. I asked the bookkeeper what the book was.

Mr. TUCKER: I object.

Q. In this book which I show you at page 2 I turn to an entry under date May 22, 1903 and ask you in whose handwriting in your opinion is that entry?

Mr. TUCKER: I object.

Q. Is that entry in the hand-writing of the bookkeeper of May and Jekyll?

Mr. TUCKER: I object.

The AUDITOR: The objection sustained.

Q. State, if you know, the handwriting of the bookkeeper of May and Jekyll to whom you referred sometime ago?

A. I think I do.

Q. Have you ever seen him write?

A. Yes.

Q. Is that entry in his handwriting?

A. In my opinion it is.

Mr. DARLINGTON: I object to the entry of May and Jekyll's book-

keeper as being no evidence against Cowardin Bradley Clay Company.

Q. When did you first see this book that I have shown you?
A. Within two or three days of my first coming to the Washington Filtration plant.
Q. That you say was August 29, 1903?
A. Yes.
Q. Was this entry to which I have referred in the book at that time?
A. It was.

Mr. FRAILEY: I offer that entry in evidence.
Mr. DARLINGTON: I object as against Cowardin Bradley Clay Company.
Mr. TUCKER: I object on the ground heretofore stated and on the further ground that no agency has been shown between the alleged bookkeeper of May and Jekyll whose entry or declaration would in any wise bind May and Jekyll.
The AUDITOR: The ruling is reserved.

Q. You have stated I think that you examined the books of May and Jekyll?
A. Yes.

Mr. FRAILEY: I notified Mr. Tucker, if your Honor pleases, to produce here the books contained in this notice, the ledger and all the papers of May and Jekyll for 1903, I would like to ask if they have been produced here.

Mr. TUCKER: I have not produced them. Messrs May and
30 Jekyll are in Cuba and they informed me that their books are in storage in New York somewhere.

Mr. FRAILEY: I ask leave to introduce secondary evidence of their contents.

Q. In the books of May and Jekyll which you examined what if anything did you find with reference to the charge in the mule account which should or should not have been there?

Mr. DARLINGTON: I object on behalf of Cowardin Bradley Clay Company to questions concerning entries by the bookkeeper of May and Jekyll and to all further testimony on that subject.
The AUDITOR: The objection is sustained.

Q. What entires did you find, if you recollect with reference to a charge of $1149 under the head of mule account?

Mr. TUCKER: I object on the grounds heretofore stated and on the further ground that the book or books of May and Jekyll referred to are not in any way identified by the question.

A. I found a charge of $1149 in the mule account which I traced out and found to be three notes of $383 each in favor of the Austin Manufacturing Company, which notes were included in the charge which I have already testified to on page 2 of this ledger.

Q. Were those three notes included in the entry which has been offered in evidence?

A. Yes.

Q. What is this book in which this entry of May 22, 1903 appears, what does the book purport to be upon its face?

Mr. DARLINGTON: I object in so far as the book can prove itself.

The AUDITOR: The objection is sustained.

Q. You stated you examined this book in which this entry is found?

A. I did.

Q. I will ask you to look at page 5 and state whether any entries of notes appear on that page?

Mr. TUCKER: I object, if the entries are there, they are the best evidence, if they are admissable at all.

Q. Do you know in whose handwriting those entries on page 5 are?

A. No, I do not.

Q. Did you find in the book of May and Jekyll any entry in the sum of $720 being entries concerning wheel scrapers?

A. You have stated the amount wrong, if you will permit.

Q. Did you find any entry with reference to wheel scrapers which included $1149 which you have said was charged with reference to mules?

A. Yes.

Q. Explain that?

Mr. TUCKER: I object on the ground that the only admissible manner of examining this witness is to ascertain what the entries were on the books in question, leaving it to the Auditor to draw his conclusions from such entries.

Mr. FRAILEY: I offer this witness as an expert bookkeeper and accountant and claim the right to examine him as to not only
31 what his recollection is, but also as an expert to explain the entries which he may have found.

Q. What was the entry if you recall it?

A. I found an item of $1149 charged to wheel scrapers.

Q. On the books of May and Jekyll?

A. Yes.

Q. Was that item $1149 also charged to mule account in the same book?

A. Yes.

Q. How many times was that item, charge, made in the books of May and Jekyll?

A. Twice.

Q. How charged?

A. It was charged once in taking over the balances to May and Jekyll from this ledger which is in evidence, it was charged again when the notes which had been issued for this amount were paid.

Q. This item which has been offered in evidence May 22, 1903 is that one of the balances carried from May and Jekyll's books?

A. Yes.

Q. Does that include one of the charges of $1149 in the books of May and Jekyll to which you refer?

A. It does.

Q. Have you any personal knowledge as to these mules as to whether they were or were not a part of the filtration plant taken over by Dean and Shibley from Cowardin Bradley Clay Company?

A. I have.

Q. What is it?

A. I counted the mules.

Q. How many were there?

A. Fifty.

Q. As an expert bookkeeper, Mr. Price, when these notes that you speak of, of Austin Manufacturing Company, were paid, to what account should they have been charged?

A. When the notes were issued according to proper bookkeeping methods they should have been credited to an account called bills payable and the proper account charged, when they were paid the notes should have been charged to bills payable.

Q. To what account were they charged on the books of May and Jekyll when the notes were paid?

A. When the notes were paid, they were charged to mule account.

Q. Do you remember in what book of May and Jekyll was the account of those three notes?

A. Yes, they showed three notes separately on the three different days on which they were dated.

Q. What was the total of the three?

A. $1149.

Q. You have already told us that $1149 was the amount of these three notes as they were charged to mule account?

A. Yes.

Q. And that they were charged on the books twice?

A. Yes.

Q. To what account was the first charged?

A. Wheel scrapers.

Q. I will ask you whether the books showed that the item of $1149 charged twice as you said, were the proceeds of these three notes?

A. Yes.

By Mr. TUCKER:

Q. Mr. Price, when did you examine these books of May and Jekyll?

A. Within two or three days after my arrival in Washington on the 29th of August, 1903.

32 Q. Any expert examining these books would have detected this erroneous method of bookkeeping, would he not?

Mr. FRAILEY: I object.

The AUDITOR: The objection is overruled.

A. I should say that any expert should have discovered it.

Q. You have stated that you had personal knowledge of the number of mules received by Dean and Shibley from Cowardin Bradley Clay Company, did you similarly have personal knowledge of the

number of wheel scrapers received by Dean and Shibley from Cowardin, Bradley Clay Company?

A. Yes.

Q. How many were there?

A. I don't remember the number now, but I knew at the time, I counted them and tallied them with the inventory.

Q. By the inventory, do you mean this schedule which I hand you (indicating Schedule B attached to the agreement of August 25, 1903)?

A. Yes.

Q. That schedule shows the number of wheel scrapers to have been 53, was that the number received by Dean and Shibley from Cowardin, Bradley, Clay Company?

A. It was, if that is an exact copy of the paper which I handled.

Q. So that, as I understand you, 50 mules and 53 wheel scrapers were received by Dean and Shibley from Cowardin Bradley, Clay Company at or about the time you became acquainted with this matter?

A. Yes.

Q. What was the name of this bookkeeper of May and Jekyll that you have referred to in your direct examination?

A. I cannot remember his name.

Q. Can you repeat from memory exactly or substantially what the entry was in May and Jekyll's books relating to these wheel scrapers and mules?

A. Yes.

Q. Dictate then as nearly as you can, exactly what those entries were, in the form they are on the books themselves?

A. They appear as debit——

Q. I want the exact words.

A. No I won't attempt that.

Q. Then as I understand your testimony, it is as to the effect of these various charges on the books, you do not attempt to state in so many words and figures what the entries were?

A. I cannot state in figures what the entries were, I can state the effect on the whole, but I could not say just what the words of the entry was.

Q. Did those entries show or tend to show that 53 wheel scrapers and 50 mules were not received by Dean and Shibley from Cowardin, Bradley, Clay Company?

A. No.

Q. So far as the books were concerned they showed that that number of wheel scrapers and mules were actually received by Dean and Shibley?

A. Yes.

By Mr. DARLINGTON:

Q. Mr. Price, do you know in whose possession those mules were when you counted them?

A. They were in possession of employees of Dean and Shibley.

33 Q. You don't know how long they had been in their possession?

A. Yes, Dean and Shibley assumed charge the day I took the inventory.

Q. Have you any personal knowledge as to the party or parties from whom Dean and Shibley received these mules?

A. No.

Q. You don't know whether they did not get them directly from May and Jekyll.

A. No.

Q. This schedule B to which you have referred in your cross-examination appears to be a schedule included in the contract between Cowardin, Bradley, Clay Company and May and Jekyll, Dean and Shibley being no parties to it.

A. No, Dean and Shibley is mentioned in that first page.

Q. Do you know of any schedule made up of the articles as between Cowardin, Bradley, Clay Company and Dean and Shibley, or did you simply use Schedule B?

A. I simply used the schedule B which was handed to me by the representative of Dean and Shibley when I was employed.

Q. You stated you found Dean and Shibley mentioned in this contract between Cowardin, Bradley, Clay and Company and May and Jekyll, I will ask you to point out any reference to them?

Mr. FRAILEY: I object.

A. No.

The AUDITOR: The objection is overruled.

Q. What were the books of Cowardin, Bradley, Clay Company by which you were to verify the schedules at this time, shortly after August 29th?

A. The books were the ledger, and some minor subsidiary books which I found in the office at that time.

Q. Is the ledger about which you have been examined the one to which you refer?

A. Yes.

Q. How did you know they were Cowardin, Bradley, Clay Company's books?

A. I have no personal knowledge that they were Cowardin Bradley, Clay Company's books, but I asked the bookkeeper then in charge of the office what books they were and he told me that they were Cowardin, Bradley, Clay Company's books.

Q. You refer to the bookkeeper of May and Jekyll?

A. Yes.

Mr. DARLINGTON: I object to any declaration by May and Jekyll's bookkeeper as incompetent against Cowardin Bradley Clay Company.

Mr. FRAILEY: I submit the answer should stand as a direct answer to the question propounded.

Q. You have identified some entries in this ledger as being in the handwriting of May and Jekyll's bookkeeper?

A. Yes.

Q. Are you able to identify the handwriting of any other entry in the book?
A. Yes.
Q. Whose handwriting can you identify?
A. The handwriting of May and Jekyll's bookkeeper.
Q. Are those the only entries you can identify?
A. Yes.

34 By Mr. FRAILEY:

Q. You were asked by Mr. Darlington, if I am correct, whether you could identify any other entries in the book which you have said you were told was the ledger of Cowardin Bradley Clay Company, to which you replied you could identify other entries, turn to page 2 of this book which purports to be the ledger mentioned, you have identified an entry there as being on the handwriting of the bookkeeper of May and Jekyll, the entry dated May 22.
A. Yes.
Q. On that page how many other entries appear?

Mr. DARLINGTON: I object.
Mr. FRAILEY: I move to strike out the answer that he could identify other entries in the book as immaterial.
The AUDITOR: I deny that motion and allow the testimony to stand.

Q. This entry of May 22, 1902, in the handwriting of the bookkeeper of May and Jekyll in this ledger, does that item being $1972.92 appear in the books of May and Jekyll?
A. Yes.
Q. And does it appear on those books that the $1149 charge as you have described on their books is a part of this $1972.92?
A. It does.
Q. Under which entry does this $1972.92 appear on the books of May and Jekyll, under wheel scrapers or mule accounts?
A. This particular item appears under wheel scrapers.
Q. Do you remember approximately the date of these entries in the books of May and Jekyll as to whether the dates are before or after you went to the plant?
A. Oh, before I went to the plant.
Q. Dates prior to August, 1903?
A. Yes.
Q. Could you fix approximately on what dates those entries were made?
A. On May and Jekyll's books?
Q. Yes.
A. They appear at different times from May 22d, to August 29th.
Q. You can't recall the specific date of any specific entry?
A. No.

Mr. HENRY B. DEAN having been sworn testified as follows:

Q. Where do you live?
A. Providence.
Q. Rhode Island?
A. Yes.
Q. What is your occupation?
A. Banker and Broker, at the present time President of the Sand Filtration Corporation of America.
Q. Are you the Mr. Dean who figures in this proceeding as one of the partners of Dean and Shibley?
A. I am.
Q. The surviving partner?
A. Yes.
Q. You are the gentleman whom the Sand Filtration Corporation succeeded in the construction of the Filtration Plant here in Washington?
A. Yes.
Q. Did you have any dealings with Cowardin Bradley Clay Company personally?
A. I did.
Q. Tell us what occurred with reference to the transfer of the property enumerated in Schedule B which has been re-
35 ferred to?
A. That schedule was represented to be the cost price to Cowardin Bradley Clay Company of the property appearing on their books turned over to us.

Mr. DARLINGTON: I object to oral testimony upon this subject if the alleged representation was in writing, this should be produced.
Mr. TUCKER: I unite in this objection if it is intended that May and Jekyll made such representations.

Q. Mr. Dean who made these representations?
A. Mr. Cowardin and Mr. Bradley.
Q. Are they members of the firm of Cowardin Bradley Clay Company?
A. They were.
Q. When were these representations made?
A. At the time of the execution of the bill of sale and agreement.
Q. What bill of sale and agreement do you refer to?
A. Referred to in the general transfer of property and the contract.
Q. In other words you mean at the time Dean and Shibley took over the plant?
A. Yes.
Q. Where were they made?
A. In the office of Charles A. Douglass.
Q. In this City?
A. Yes.
Q. What did they say?
A. They said to us that these were the costs price to them of the plant as installed at that time of the contract.

Q. Was that said by them with reference to the items mentioned and enumerated in Schedule B?

A. Yes.

By Mr. DARLINGTON:

Q. You were aware were you not that the bulk of the articles enumerated in Schedule B had been purchased not by Cowardin, Bradley Clay Company, but by May and Jekyll?

A. I did not.

Q. You bought them on the same day that May and Jekyll executed the agreement transferring them to Cowardin Bradley Clay Company?

A. I did not know that.

Q. You were entirely innocent of any knowledge of May and Jekyll's connection with them?

A. I had some knowledge of their previous connection with it, yes.

Q. Cowardin, Bradley Clay Company did not tell you then that Schedule B represented the cost of the articles to May and Jekyll?

A. The cost to them, I understood.

Q. Have you any evidence that this representation was not entirely correct?

A. I have.

Q. Will you produce it.

A. By the books of Cowardin Bradley Clay Company.

By Mr. TUCKER:

Q. How many mules did you get from Cowardin Bradley Clay Company?

A. Fifty.

Q. How many wheel scrapers?

A. The list says fifty-three.

Q. Was that right?

A. So far as I know. I didn't count them, either the mules or the scrapers.

Q. Do I understand your claim here to be that you received
36 fewer mules and wheel scrapers than you were led to believe you would receive from the books of May and Jekyll or Cowardin Bradley Clay Company?

A. No, but we have paid more than we were told we should pay for the scrapers and mules, it is not that we received less, but that we paid more than we were told we should pay. Because we were told that the schedule represented the cost price and we have proven that we paid $1149 more than the cost price, it appearing to be an error in the entries, honest no doubt, but plainly an error on the part of the bookkeeper.

Q. You had no connection with May and Jekyll in this transaction?

A. None whatever.

Q. Do you know why the books of May and Jekyll were left at the office of the Sand Company, if they were so left?

A. Not to my knowledge.
Q. They were left there?
A. Not for any length of time.
Q. Mr. Price your expert claims to have examined them some four or five days after this contract of August 25?
A. No doubt, they remained there a week or ten days maybe longer.
Q. Do you know of any agreement, have you seen any papers purporting to be between May and Jekyll and Cowardin Bradley Clay Company executed by them which contains a schedule which is the exact duplicate of schedule B referred to?
A. I have not seen the original.

Adjourned.

In the Supreme Court of the District of Columbia.

In Equity. No. —.

THOMAS E. STAGG
v.
SAMUEL P. COWARDIN ET AL.

SATURDAY, *July 7th,* 1906—1 o'clock p. m.

Hearing pursuant to notice.
Present: Mr. Darlington on behalf of the Cowardin, Bradley, Clay Company; Mr. Frailey for Sand Filtration Corporation and Mr. Tucker for May and Jekyll.
Stipulation: It is stipulated and agreed between counsel for the respective parties that the Schedule B mentioned in the contract of August 25th, 1903, between Cowardin Bradley, Clay & Company, and May and Jekyll, and the Schedule A mentioned in the contract of the same date, between Cowardin, Bradley, Clay & Company and Dean and Shibley, are identical.
Mr. TUCKER: I offer in evidence the contract of August 25th, 1903, with attached contract of May 26th, 1903, both between Cowardin, Bradley, Clay & Company and May and Jekyll, together with the schedules therein referred to and thereto attached. Proof of the execution of the same is waived by counsel for Cowardin, Bradley, Clay & Company and the Sand Filtration Corporation,
37 and it is stipulated and agreed between counsel that a copy shall be filed and used as evidence in lieu of the original, subject to all objections and exceptions as to their irrelevancy and immateriality, the memorandum contained on the back of the contract just offered in evidence, not being included in the offer.
Mr. FRAILEY: I object to this contract as irrelevant, immaterial and incompetent.
(Said contract being as follows:)

Memorandum of Agreement made and entered into this 25 day of August, 1903, by and between Samuel P. Cowardin, James F. Bradley, Sydney P. Clay, Thomas E. Stagg of the City of Richmond, State of Virginia, co-partners, trading and doing business under the firm name and style of Cowardin, Bradley, Clay and Company, parties of the first part, and Robert H. May, George E. Jekyll, and Arthur B. Jekyll, of the City and State of New York, co-partners trading and doing business under the firm name and style of May & Jekyll, parties of the second part.

Whereas an agreement was made and entered into on the 26th day of May, 1903, by and between the parties hereto of the first part, and one Michael Kelly and the parties hereto of the second part, which said agreement or an accurate copy thereof is made a part hereof as if fully herein set forth, and

Whereas it is the desire of the parties thereto to cancel the same and discharge all and every of the obligations of either of the parties thereto.

Now therefore, this agreement witnesseth:

1. That said contract of May 26th, 1903, be and the same is hereby cancelled and all and every of the obligations of the parties thereto to each other are hereby finally discharged.

2. In consideration of the covenants of the parties hereto of the second part hereinafter set forth, the parties hereto of the first part covenant and agree to assume, and to procure the assumption thereof by any third party or parties who may hereafter undertake to complete the contract of the parties hereto of the first part with the United States, mentioned in said contract of May 26th, 1903 at the instance of request of the parties of the first part, all of the debts and liabilities of the parties hereto of the second part as shown on a schedule annexed hereto and made a part hereof and marked "Schedule A;" and the parties hereto of the first part further covenant and agree that they will contemporaneously with the execution and delivery of this agreement, execute and deliver to Charles A. Douglass and Edward B. Kimball as trustees, a deed transferring and assigning to said trustees all of the articles of personal property to be conveyed to the parties of the first part as provided for in the succeeding paragraph hereof; and included in the schedule mentioned therein and attached thereto as "Schedule B," in trust to hold the same as securtiy for the payment of said debts and liabilities of said parties of the second part as set forth in said Schedule "A";

and providing that such of said articles of personal property
38 as may be insurable, shall be kept insured, if possible and practicable to an amount equal to the amount of said debts, and further providing that upon the failure to pay and satisfy any of said debts, within twenty (20) days after demand of any of said creditors, said articles of personal property shall be sold by said Trustees at public sale upon such notice as they, in their discretion, shall deem necessary, and the proceeds of sale applied to the payment of said debts; the parties thereto of the second part not to be liable for any of the fees or commissions of said trustees, or the expenses of any sale made by them.

3. And in consideration of the assumption of their debts as aforesaid by the parties of the first part as above set forth, the parties of the second part hereby assign, transfer and make over to the parties hereto of the first part all of their right, title and interest in and to all contracts, privileges, franchises and easements heretofore acquired and now owned by them and pertaining to their construction plant upon the work hereinafter mentioned, and also all of their right, title and interest in and to all of the articles of personal property on the site of the filtration plant, a portion of which the parties of the first part are now under contract with the United States to construct and erect; and further covenant and agree to procure from the trustees Messrs. Darlington and Tucker, named in said contract of May 26th, 1903, an absolute bill of sale of that portion of said articles of personal property, the title to which is now vested in said trustees, to the parties of the first part, a schedule of all of which said articles of personal property is attached hereto and made a part hereof and marked "Schedule B."

4. The parties of the first part further covenant and agree to protect, indemnify and save harmless the parties of the second part from any loss or injury, damage, or liability that may result to them from the fact that Michael Kelly, one of the parties to the said contract of May 26th, 1903, is not a party to this instrument.

5. Inasmuch as the parties of the second part have heretofore advanced to the parties of the first part the sum of Ten thousand dollars ($10,000) under the eighth paragraph of said contract of May 26th, 1903, and there now remains due to the parties hereto of the second part Eight thousand dollars ($8,000) thereof, Two thousand dollars ($2,000) having been paid thereon, the parties of the first part hereby covenant and agree to repay the parties of the second part, or to their order, the said sum of Eight thousand dollars ($8,000) out of the net profits which may be realized by the parties of the first part from the construction or erection of that portion of said filtration plant which they have contracted with the United States to construct or erect. The said Eight thousand dollars ($8,000), if the same shall not sooner be voluntarily paid by the parties of the first part to the parties of the second part shall be reserved and paid out of the ten per cent. of the contract price for said work which will be reserved to the United States; and if the parties of the first part shall not themselves continue said work under their contract with the United States or shall procure some third party or parties to perform the same, or if the same shall be performed
39 by any person or persons on behalf of the parties hereto of the first part, appropriate provision shall be made for the reservation and payment of said Eight thousand dollars ($8,000) to the parties hereto of the second part; it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the Eight thousand dollars ($8,000) shall be under the contingency that the parties of the first part shall realize a profit under said contract with the United States and not otherwise; and that if any profit shall be so realized by them, it shall be subjected to the payment of the said Eight thousand dollars ($8,000), or so much thereof as said profits will pay and satisfy.

In witness whereof the parties hereto have hereunto set their hands and affixed their seals on the day and in the year first above mentioned.

Executed in duplicate.

SAMUEL P. COWARDIN. [SEAL.]
JAMES F. BRADLEY. [SEAL.]
SIDNEY P. CLAY. [SEAL.]
THOMAS E. STAGG. [SEAL.]
ROBERT H. MAY. [SEAL.]
GEORGE E. JEKYLL. [SEAL.]
ARTHUR B. JEKYLL. [SEAL.]

Witnesses:
CHAS. COWLES TUCKER.
CHAS. A. DOUGLASS.

Memorandum of Agreement entered into this 26th day of May, 1903, by and between Samuel P. Cowardin, James F. Bradley, Sydney P. Clay, Thomas E. Stagg and Michael Kelly of the City of Richmond, State of Virginia, copartners, trading and doing business under the firm name and style of Cowardin, Bradley, Clay and Company, parties of the first part and Robert H. May, George E. Jekyll, and Arthur B. Jekyll of the City and State of New York, copartners, trading and doing business under the firm name and style of May & Jekyll, parties of the second part, witnesseth:

Whereas, the parties of the first part are the contractors *for* supply the labor and materials for the construction and completion of the filter plant for the City of Washington, District of Columbia, under and by virtue of a contract between the parties of the first part and Lieut. Colonel A. H. Miller, U. S. A., acting in behalf of the United States, dated the 6th day of April, 1903, which said contract is made a part hereof, as is herein set forth, the original of which, or an accurate copy thereof, is to be delivered to the parties of the second — upon execution and delivery of this agreement; and

Whereas, the parties of the first part now desire the parties of the second part to complete for them the said filter plant according to the said contract betwen them and the United States;

Now, therefore, this agreement witnesseth, that the parties of the first and second parts do mutually covenant and agree to and with each other as follows, to wit:

1. The parties of the second part covenant and agree to assume and pay the existing obligations of the parties of the first part and expenses incurred and paid by them, as set forth and described in Schedule A hereunto annexed and made a part hereof.

2. The parties of the first part hereby hire and employ the parties of the second part to provide all of the work, labor and material of every kind necessary to complete the said contract, together with a plant adequate to enable them to do so, and to go on and finish the said filtration plant in accordance, in all respects, with the terms, specifications, requirements and provisions of said contract of the parties of the first part with the United States in respect of said work; provided, said parties of the first part shall, in all respects, comply with the undertaking on their part in this agreement contained:

3. That for all work, labor and materials performed, supplied and furnished by the parties of the second part covered by the terms of the said contract of the parties of the first part with the United States as aforesaid, the said parties of the first part shall pay to the parties of the second part, out of the proceeds to be realized on said contract with the United States, a sum equal to ninety per centum of the contract price so received, in manner and form as follows, that is to say, the parties of the second part shall receive ninety per centum of the proceeds of every partial payment and the parties of the first part shall receive ten per centum of the same; and of the ten per centum of said contract price which under the contract with the United States is to be withheld until the completion of the same, the parties of the second part are to receive ninety per centum and the parties of the first part ten per centum; the parties of the first part reserving the right to receive from the United States the said proceeds in the manner hereinafter provided for, but as to the share of the proceeds due as aforesaid to the parties of the second part, the parties of the first part, in receiving the same in the manner hereinafter set forth, are to be deemed the agents for the parties of the second part, and upon the receipt thereof are to immediately pay the same over to them as hereinafter provided for; all drafts, warrants, or checks which shall be received from the United States to be received and endorsed over and the proceeds thereof applied in the manner hereinafter provided for:

4. The ten per centum of the contract price reserved to the parties of the first part hereunder shall apply only to the following work mentioned and described in or covered in and by paragraph one (1) of the contract with the United States (Form 19-*a*); that is to say, 880,000 cubic yards excavated; 65,400 cubic yards embankment under filters; 46,700 cubic yards other embankment; 123,400 cubic yards filling over filters; 3,000 cubic yards, puddle; 31 acres seeding; 9700 square yards, sodding; 39,300 cubic yards concrete in floors, 36,300 cubic yards, concrete in walls; 8,200 cubic yards, concrete in piers; 37,400 cubic yards, concrete in vaulting; 35,000 square yards, granolithic pavement; placing materials in masonry, complete, and drainage of roofs. If the above work shall be held by the United States to include the construction of 29 filters instead of 24, then the parties of the first part shall receive ten per centum upon the
41 price paid for 38 filters, but if it shall be held by the United States to include the construction of 24 filters instead of 29, then the parties of the first part shall be paid ten per centum upon the price paid for the 24 filters only. The parties of the first part shall pay to the parties of the second part all of the compensation which may become due from the United States for all work performed under said contract with the United States other than that mentioned and described in this paragraph, and for all work denominated as extra work in paragraph 391 of the Specifications attached to and made a part of said contract with the United States.

5. If necessary, or if it shall be required by the United States, the parties of the first part shall personally supervise the work, and during their absence the parties of the second part shall be, and shall

be deemed to be, their agents, and as such shall have full authority to act as the legal representatives of the parties of the first part in the matter of the performance of said work, with full power and authority to use the names of the parties of the first part in all dealings with the United States, and with all persons whatsoever, respecting said work, except that they shall have no power to contract any debts or liabilities in the name or upon the credit of the parties of the first part, and to receive and open all mail relating to said work addressed to said parties of the first part. The parties of the second part shall be subrogated to the rights of the parties of the first part in the matter of all claims against the United States growing out of said contract between the United States and the parties of the first part, and the parties of the second part shall be entitled to use the names of the parties of the first part in the prosecution of any such claim or claims. If, for any reason, the United States shall suspend the monthly or other payments on said contract, or, if by alterations ordered by the United States, the contract price for said work shall be in anywise diminished, the parties of the first part shall by reason thereof, have no claim against the parties of the second part.

6. In consideration of the foregoing, the parties of the second part covenant and agree that they will, in all respects, fully perform and complete the said contract of the said parties of the first part with the United States, according to said contract and in compliance with each and every of its terms, conditions and requirements.

7. As a guarantee that they will fully perform and complete the work required to be done, and furnish the materials required to be furnished under said contract with the United States, for the said filtration plant, and to indemnify the parties of the first part from all risk, loss and responsibility of any and every kind arising or to arise thereunder, whether to the United States or to the material men, mechanics, laborers, or otherwise, the parties of the second part hereby covenant and agree that they will pay over to Joseph J. Darlington and Charles Cowles Tucker the sum of Fifty thousand dollars ($50,000), of which Thirty-five thousand dollars ($35,000) shall be paid within forty-eight hours after the execution and delivery of this agreement, and the remaining Fifteen thousand dollars ($15,000) on or before the 15th day of June, 1903; the said
42 Fifty thousand dollars ($50,000) to be held and expended by them as trustees in manner and form following, that is to say: the said sum of money shall be deposited in the Riggs National Bank, in the City of Washington, District of Columbia, to the credit of said trustees, and the same shall be withdrawn only upon check jointly signed by said trustees. Said sum of money shall be expended in the purchase of a plant, which shall be purchased in the name of said trustees and used in the District of Columbia only, for the purpose of carrying out said contract with the United States. Said plant shall consist of the certain articles and implements already purchased and contracted for by the parties of the first part and set forth and described in Schedule B hereunto annexed and made a part hereof; and also all such additional implements and articles as may be selected by the parties of the second part. The property in said plant shall remain in the said trustees,

and the said plant shall not be removed from the District of Columbia until the said contract with the — shall be fully and satisfactorily performed and completed and all of the contract price distributed as hereinbefore provided for, or unless the parties hereto of the first part violate any of the terms of this contract; at which time and in which event, the said plant shall be turned over to the parties of the second part, or their assignees and shall thereafter remain their absolute property. The commissions of said trustees for their services shall be two per centum of the entire amount of said fund, and shall be paid by the parties of the first part. In event that work under this contract with the United States shall be stopped by the parties of the second part, in violation of this contract, then the said trustees shall turn over the said plant to the said parties of the first part who shall thereupon continue and complete the work under said contract with the United States, and upon the full completion thereof shall deduct from the contract price, or the balance thereof remaining due, ten per centum thereof, together with all actual damages, if any, suffered by the parties of the first part by reason of the stoppage of the work as aforesaid, and after the payment of all of such damages and also of the expenses of prosecuting said work to completion, any excess which shall remain shall be paid to the parties of the second part, and the said plant shall thereupon be turned over to them; provided, however, that said plant shall always be and remain charged with the payment of any actual damages suffered by the parties of the first part by reason of any such violation of this contract by the parties of the second part. In event that the United States shall prevent the parties of the second part, as the agents or employees of the parties of the first part, from performing or completing said contract with the United States; or in event that the parties of the first part shall be in default in anywise under this contract; or in event that the parties of the second part shall for any cause, other than their own misfeasance, nonfeasance or malfeasance, be prevented from carrying out and performing this contract, said plant shall be delivered to them by the said trustees free and discharged of any claim whatsoever on the part of the parties of the first part, or anyone
43 claiming under them. If the United States shall prevent the parties of the second part from commencing the work under said contract with the United States, without fault or default upon their part, or from continuing the work after the first instalment on the contract price shall become due, the $10,000 advanced hereunder to the parties of the first part shall be forthwith returned to the parties of the second part and, if unpaid, the latter shall have a lien therefor upon any and all checks, drafts or warrants hereafter issued by the United States to the parties of the first part under their contract with the United States.

8. The parties of the second part shall further advance to the parties of the first part, upon execution and delivery hereof, the sum of Ten thousand dollars ($10,000) which sum shall be repaid to the parties of the second part out of the share of the parties of the first part above reserved to them from the partial payments to be made by the United States as the work progresses: that is to say, out of

that portion of the partial payments remaining after paying to the parties of the second part ninety per centum thereof as aforesaid; provided, however, that said repayment or reimbursement shall be made out of the share of the parties of the first part of the first partial payment which shall become due and payable six months after the date hereof; and if the amount due the parties of the first part out of said last mentioned partial payment shall be insufficient to repay said $10,000 in full then from the share of the parties of the first part of the succeeding partial payment or payments thereafter until the said sum of $10,000 shall have been fully repaid to the parties of the second part.

9. The parties of the first part to secure the parties of the second part the payment of the sums that will become due to them from time to time on account of the performance and completion of the said contract with the United States and of their said advance of Ten thousand dollars ($10,000) as aforesaid, hereby give to the parties of the second part a lien upon any and all checks, drafts and warrants to be issued by the United States, and the proceeds thereof, in payment of the contract price of said filtration plant, and the instalments thereof; and the parties of the first part do hereby constitute and appoint the parties hereto of the second part agents and attorneys in fact of the parties of the second part, irrevocably, to receive from the United States each and every of said checks drafts or warrants: and do further covenant and agree that they, the parties of the first part, acting in that behalf by Samuel P. Cowardin, who is hereby constituted and appointed attorney in fact, irrevocably, for the parties of the first part so to do, or, in event of his death or disability, by James T. Bradley, who is hereby appointed as such attorney in fact, irrevocably, for the parties of the first part so to do, will sign all necessary vouchers and receipts and will endorse in the firm name of the parties of the first part, or in such manner and form as may be required by the accounting officers of the Government, and deliver to the parties of the second part, all drafts, warrants and checks that may be received on account of the said contract with the United States; and further, that they, the parties of the first part, will not ask, demand or receive any of the said
44 checks, drafts or warrants except in the presence of the parties of the second part, or one of them, or an agent or attorney appointed by them; and that whenever any of such checks, drafts or warrants are to be delivered the said Samuel P. Cowardin, or in event of his death or disability the said James F. Bradley on behalf of the parties of the first part will attend in person with the parties of the second part, or one of them, or their duly authorized agent or attorney, from time to time as may be necessary, upon the Government officer authorized to deliver said checks, drafts or warrants, upon being notified by the said parties of the second part so to do, and will then receive any such draft, warrant or check and will immediately endorse and deliver the same over to the parties of the second part, or their duly authorized agent or attorney, who shall thereupon and at once pay over to said Cowardin, or in event of his death or disability, to said Bradley, as agent and attorney for the parties

of the first part the share of the proceeds of any such draft, warrant or check due the parties of the first part as aforesaid; provided, however, that before endorsing any such warrant, check or draft, the parties of the first part shall be entitled to demand, and the parties of the second part shall thereupon furnish, satisfactory evidence to said Cowardin, or in event of his death or disability, to said Bradley, acting on behalf of said parties of the first part, that all material upon which the monthly estimates are based and for which such check, draft or warrant is issued, has been fully paid for. In event of the failure or refusal of the parties of the first part so to receive and endorse and deliver, or cause to be received, endorsed or delivered any such check, draft or warrant, it shall be competent for the parties of the second part to apply to any court of competent jurisdiction to have a receiver appointed to receive such check, draft or warrant; and the parties of the first part hereby consent to the appointment of such a receiver.

10. The parties of the first part further covenant and agree that they will not, as between themselves, apply to any court for the appointment of a receiver of their copartnership property or make any assignment of the proceeds of the said contract, or any instalment thereof, or any payment to be made thereupon, to any person other than the parties of the second part, and, further, that the provisions of this agreement, and each and every of them, may be specifically enforced in equity or by injunction or by mandamus, or other agreeable process as may be agreeable to law and to equity.

11. All permits from the owners and agents of land to dump excavated material thereon, and all permits and privileges of every kind whatsoever pertaining to said work to be done under said contract with the United States, held or owned by the parties of the first part are hereby assigned and transferred to the parties of the second part, and any and all such permits in writing are to be delivered to the parties of the second part, upon the execution and delivery hereof.

In testimony whereof, the parties hereto have hereunto set
45 their hands and affixed their seals, at the City of Washington, District of Columbia, on the day and year first hereinbefore written.

Executed in duplicate.

SAMUEL P. COWARDIN. [SEAL.]
JAMES F. BRADLEY. [SEAL.]
SIDNEY P. CLAY. [SEAL.]
THOMAS E. STAGG. [SEAL.]
MICHAEL KELLY. [SEAL.]
ROBERT H. MAY. [SEAL.]
GEORGE E. JEKYLL. [SEAL.]
ARTHUR B. JEKYLL, [SEAL.]
For GEORGE E. JEKYLL.

Witnesses:
MARIE C. BROWN.
CHAS. COWLES TUCKER.

SCHEDULE A.

Obligations Due and Expenses Incurred and Paid by Cowardin, Bradley, Clay & Co. for Other Than Plant.

Class 1.

Obligations Due and Expenses Incurred to be Assumed and Paid by May & Jekyll.

Wm. J. Holtman, feed	$691.41
R. P. Andrews, stationery	38.08
Merchants' Transfer & Storage Co. drayage	82.38
Knox Express Co. drayage	18.00
National Publishing Co. Printing	10.00
	$839.87

Class 2.

Expenses Heretofore Paid by Cowardin, Bradley, Clay & Co. to be Repaid Them by May & Jekyll.

Stable expenses	$270.12
Interest and discount	87.40
General expenses	786.80
Travelling expenses	387.14
Oil and grease	2.00
Blacksmith shop expenses	12.00
R. L. French, account of salary	10.00
Salary account	100.00
Excavating, labor work with scrapers	650.30
	$2,305.76

46 SCHEDULE B.

Plant Purchased and Contracted for by Cowardin, Bradley, Clay & Co.

Wheelscrapers	$1,872.92
Tools	169.97
Stable Buildings	301.60
Mules (50 at $191.97 each)	9,598.50
Harness	762.75
Wagon	35.00
Office fixtures	80.65
Blacksmith Shop tools	72.07
Track equipment (Railroad ties)	10.00
Freight on harness	13.20
W. R. Lipscomb, office building	830.00

S. D. Houck & Co. harness	9.75
J. C. Dickerson, harness	341.62
Rudolph, West & Co., tools, bar iron, roofing, etc.	104.72
J. B. Kendall, chain flatter & bar iron	11.68
Daly for water main, stable & concrete	313.62
Smith Courtney Co. plows and points	50.00
6 wagons	378.00
2 plows	48.00
6 points	32.00
Eisinger Bros. lumber	523.74
	$15,659.79

Due on account of above plant as follows:
Austin Mfg. Co. wheelscrapers, notes, as follows:

May 1, 1903, two months	$383		
May 1, 1903, 3 months	383		
May 1, 1903, 4 months	383		
		$1149.00	
Smith Courtney & Co. plows, open acct.		19.50	
Rudolph, West & Co. tools, building material, &c. open acct		125.55	
Peter Paul, mules, balance due		2000.00	
Samuel Evans, Gen. Mgr. G. & H. Mule Co.		1950.40	
Maxwell & Howard Mule Co. note dated May 7, 1903, payable 90 days		5914.49	
J. C. Dickerson, harness		484.75	
W. P. Lipscomb, office building		830.00	
S. P. Houck, harness		9.75	
J. C. Dickerson, harness		341.62	
Rudolph, West & Co. tools, iron bars, roofing, &c		104.72	
J. B. Kendall, chains, flatters & bar iron		11.68	
Daly, water main for stable, concrete		313.62	
47 Smith Courtney Co. plows		50.00	
6 wagons		378.00	
2 plows		48.00	
8 points		32.00	
Eisinger Bros. Lumber		523.74	
			14,286.82
Balance			1,373.07

NOTE.—The trustees in purchase of plant are to pay out of the funds in their hands, the above balance of $1373.07 to Cowardin, Bradley, Clay Co. and are to pay the above amounts aggregating $14,286.82, due on account of plant, making a total expenditure by trustees for plant of Cowardin, Bradley Clay & Co. $15,659.79.

SCHEDULE A.

Carter & Clarke (Ties)		$197.36
Somerville & Sons (Steam fittings)		162.09
C. F. Wilkins & Sons (Feed)		436.07
Rudolph, West & Co. (H'ware)		997.75
Smith Courtney (Materials)		230.92
Postal Telegraph		12.95
C. F. Muth (Engineering supplies)		3.27
W. C. Robinson Sons Co. (Oils)		97.52
Harwood Bros. (Oils)		26.29
Chesapeake & Pot. Tel. Co		10.00
G. W. Offutt (Explosives)		71.90
H. V. Rusk (Closet Boxes)		16.00
Geo. W. Knox Express Co		.65
Wm. L. King (Leather)		24.30
F. P. May & Co. (H'ware)		37.81
J. B. Kendall "		240.36
Standard Oil Co. (Oils)		173.13
Morrison Paper Co. (Stationery)		42.34
Home Rubber Co. (Rubber hose, etc.)		136.39
Eisinger Bros. (Lumber)		61.50
W. J. Holtman (Coal & Feed)		1063.23
Littlefield, Alvord & Co. (Drayage & Fr't. ad.)		940.52
Johnson & Wimsatt (Ties)		367.50
M. F. Talty Estate (Ties)		113.25
Bills Payable, Sept. 5th	$720.00	
8th, 25th	652.	
		1372.00
E. H. Gray (Founder)		3.20
Electric Refining Co. (Grease)		14.34
Thos. E. Stagg		466.54
W. B. Bradley Cons. Co. (Hoisting engine)		500.00
Austin Manufacturing Co		2741.20
Lingerwood Manufacturing Co		4860.00
Manzel Bros. (Lubricators)		112.50
48 McDonald & Onderdonk		5285.73
Jno. B. McDonald		381.00
Marion Steam Shovel Co. (Repairs, etc.)		30.32
Julian Scholl & Co. (Bushing)		15.50
Wallace Stebbins Sons		5812.67
J. Jacob Shannon Co		6008.50
Vulcan Iron Works Co		182.50
Woodward, Wight & Co. (Tank 36,500 Gal.)		433.00
Benj. Watson		46.55
G. L. Morrow		369.00
Heurich Brewing Co. (400 Gal. Tank)		16.00
Maury Dove Coal Co. (15 tons coal at $4.05)		60.75
		$34,176.10

SCHEDULE B.

186160 lbs. Steel Rail		3867.97
Six switches & 6 frogs		360.37
5 Manhattan elevated R. R. locomotives		11728.00
820 cross ties		390.50
Wheelbarrows (2)		4.90
32 dump wagons, 1 sprinkler, 1 mountain wagon		3353.90
53 wheel scrapers		1533.35
40 dump cars		6191.00
Two steam shovels		15650.03
One steam roller		3574.00
Freight traction engine		38.68
One grader		1089.96
Harness		1071.30
162 whiffletrees		92.92
72 R. R. shovels		52.76
16 R. R. picks		8.00
20 mattocks		10.96
One trade jack		13.00
Plows, two, 5 shares		77.25
20 axes		17.00
4 blocks		9.30
Six crow bars, 1 claw bar		10.53
Wrenches—5 Stillson, 5 Coe's		13.17
9 Taps		5.68
4162 feet iron pipe		528.24
3 sets stock and dies		28.70
1 vice		4.50
1 pair pipe cutters		1.57
10 drill bits		5.90
19 sledges and hammers		14.72
6 pairs tongs and pincers		8.85
One anvil		15.50
Two bellows & blowers		44.00
	25 feet chain	4.90
49	3 cross cut saws	7.35
	4 pitch forks	2.00
6 lanterns		2.88
150 feet rubber hose		27.00
2 doz. padlocks		4.00
18 Galv. iron pales		3.88
Cableway and tower		5222.82
12 cans and funnels		4.50
1 platform scale		29.00
Two car replacers		29.00
One derrick		64.31
Sundry carpenter and blacksmith's tools		68.35
Live stock (50 mules)		11042.46
Cement house		1376.37
Buildings, various labor and materials		2284.12
Railroads		1956.67

Sundries from Cowardin, Bradley, Clay & Co.	2244.52
26 steel sheets for washing plant	196.93
30 dump cars	4350.00
1 traction engine	1585.00
Rock crusher (complete)	2741.20
Cableway, balance to pay	5764.90
Automatic feed pumps, three	112.50
One steam shovel	5000.00
Worthington pump, engine, boiler, 25 H. P.	381.00
B. S. Disphrang Pump complete	46.86
One 80 H. P. Portable bailer	825.00
One 13″ by 16″ trottling machine	523.00
Six timber dollies	24.00
500 — Swedish iron cable, 2 thimbles, 6 clips	29.35
Two portable boilers & engines, 1 40 H. P., 1 25 H. P.	1898.00
3300 lbs. rails	49.50
28 pair car wheels & trucks	1293.60
Water tank, 36,500 gals.	433.00
Wells lights (two)	178.00
R. R. Spikes	55.00
Track bolts	40.44
Wire nails	25.05
2000 feet 4″ iron pipe	250.00
2044 cross ties	678.11
Hoisting engine and boiler	500.00
One 400 gal. water tank	16.00
2 sets grates for steam shovel	73.50
	$101,651.10

50 EXHIBIT A.

Accompanying Testimony Taken Before Auditor.

John D. Maclennan, Receiver of Cowardin, Bradley, Clay & Co.

12 Broadway, New York, N. Y.

MAY 21, 1906.

Cowardin, Bradley, Clay & Company, to John D. Maclennan, Receiver, Debtor.

3 weeks' hotel expenses in Washington, D. C., 21 days @ $7.50	$157.50
Travelling expenses, 4 round trips New York to Washington, D. C.	80.00
Long Distance telephone service	24.50
Telegrams and postage	3.25
Expenses Mr. Hull, Fidelity & Deposit Co. of Maryland, to Washington and return	11.30
J. M. Swormstedt, General Agent, premium on bond, Receiver, two and a half years	312.50
Bill of Lawrence & Hughes, legal services	100.00
	$689.05

Exceptions to Auditor's Report.

Filed August 24, 1906.

In the Supreme Court of the District of Columbia.

No. 24167. Equity.

THOMAS E. STAGG, Complainant,
vs.
SAMUEL P. COWARDIN ET AL., Defendants.

Now comes the defendant, The Sand Filtration Corporation of America, by Charles L. Frailey, its solicitor, and files exceptions to the report of the Auditor, filed in the above entitled cause on the 2nd day of August, 1906, as follows:

1st. To so much of said report as finds that the alleged duplication in the schedule of assets of the May and Jekyll Company is not sufficiently established by proof, and that the alleged error of $1190.00 or $1149.00 was not made.

2nd. To that part of the report which disallows reimbursement of the cost of bond.

3rd. To that part of said report which finds that the legal
51 services are not shown to have been connected with the duty or service of the receiver under his appointment.

4th. To the disallowance of said claim for legal services.

5th. To the disallowance of the several items of expenses incurred by the Receiver as a whole.

6th. To the disallowance severally of each of the items above mentioned.

Aug. 24, 1906.

THE SAND FILTRATION CORPORATION OF AMERICA,
By CHARLES L. FRAILEY,
Solicitor for The Sand Filtration Corporation of America.

Order Overruling Exceptions to Auditor's Report, &c.

Filed October 10, 1906.

In the Supreme Court of the District of Columbia.

In Equity. No. 24167.

THOMAS E. STAGG, Complainant,
v.
SMAUEL P. COWARDIN ET AL., Def'ts.

This cause coming on to be heard upon the Exceptions of the Sand Filtration Company of America, to the report of the Auditor filed

in this cause, August 2, 1906, and having been argued and submitted by the solicitors for the respective parties, it is by the Court this 8th day of October, 1906, adjudged, ordered and decreed that said exceptions be and the same are hereby overruled; and further that the Receiver herein be, and he hereby is, directed to pay forthwith out of the moneys in his hand, the sum of eight thousand dollars ($8,000) to the solicitors of record for May and Jekyll, and two thousand dollars ($2,000) to the solicitor of record for Cowardin, Bradley, Clay & Company; and that said May & Jekyll and Cowardin, Bradley, Clay & Company recover their costs in this matter incurred from said Sand Filtration Company of America, said costs to be taxed by the Clerk of this Court.

And from this decree the said Sand Filtration Company of America appeals to the Court of Appeals of the District of Columbia and the penalty of the appeal bond, to operate as a supersedeas, is fixed at Ten thousand dollars.

HARRY M. CLABAUGH,
Chief Justice.

Memoranda.

October 29, 1906.—Appeal bond—filed.

November 16, 1906.—Time to file record in Court of Appeals extended to December 15, 1906.

52 *Designation of Record on Appeal.*

Filed November 28, 1906.

In the Supreme Court of the District of Columbia.

Equity. 24167.

THOMAS E. STAGG
v.
SAMUEL P. COWARDIN ET AL.

Counsel for the Sand Filtration Corporation of America, appellant from the decree of court rendered herein on the 10th day of October, 1906, hereby designates the following portions of the record in the above entitled cause to constitute a transcript of the record on appeal:

1. Petition of Cowardin, Bradley, Clay & Company for rule on receiver to show cause, filed March 6th, 1906.
2. Answer thereto of receiver.
3. Answer thereto of May & Jekyll.
4. Answer thereto of the Sand Filtration Corporation of America.
5. Rule to show cause issued on said petition.
6. Contract between Dean and Cowardin, Bradley, Clay & Company, dated August 25th, 1903 and being exhibit "B" of stipulation with exhibits filed April 2nd, 1906.

7. Supplemental agreement between Dean and Cowardin, Bradley, Clay & Company, dated August 27th, 1906 and being exhibit "C" of stipulation with the exhibits filed April 2nd, 1906.

8. Contract between Maclennan receiver, and Dean, dated August 27th, 1903, being exhibit "B" of receiver's report filed February 8th, 1904.

9. Decree of Court dated April 3rd, 1906, made after hearing upon the rule to show cause and referring the case to the Auditor.

10. Testimony taken before the Auditor with the exception of the testimony of J. D. McClenman receiver.

11. Exhibits to the testimony taken before the Auditor.

12. Auditor's report.

13. Exceptions to Auditor's report.

14. Decree of court overruling the exceptions to Auditor's report and confirming the same etc., dated October 10th, 1906.

15. Memorandum of filing of appeal bond.

16. Proceedings on appeal.

CHARLES L. FRAILEY,
Of Counsel.

By SINCLAIR,
Counsel for Sand Filtration Corporation of America.

53 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 100, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript in cause No. 24167, Equity, wherein Thomas E. Stagg is complainant and Samuel P. Cowardin, *et al.*, are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13th day of December, A. D. 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 1746. The Sand Filtration Corporation of America, Appellant, *vs.* Samuel P. Cowardin *et al.* Court of Appeals, District of Columbia. Filed Dec. 13, 1906. Henry W. Hodges, Clerk.

54 WEDNESDAY, *April 10th, A. D.* 1907.

No. 1746.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR B. JEKYLL.

The argument in the above entitled cause was commenced by Mr. C. L. Frailey, attorney for the appellant, and was continued by Messrs. C. C. Tucker and J. J. Darlington, attorneys for the appellees.

THURSDAY, *April 11th, A. D.* 1907.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR B. JEKYLL.

The argument in the above entitled cause was concluded by Mr. C. L. Frailey, attorney for the appellant.

On motion both sides are allowed to file additional briefs herein if so advised.

55 No. 1746.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
v.
SAMUEL T. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR B. JEKYLL.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

This is an appeal from a decree directing distribution of a fund in the hands of a receiver.

The necessary facts involved are these:

Cowardin, Bradley, Clay and Stagg, hereafter called the Cowardin Co., were the successful bidders for the construction of the filtration works for the District of Columbia, and on April 6, 1903, entered into a contract with the United States therefor. The Cowardin Co. purchased and contracted for certain building materials, implements and mules for the commencement of the work, at an aggregate cost of $15,659.70. On May 3, 1903, the Cowardin Co. entered into a contract with May and Jekyll for the performance of their contract. May and Jekyll agreed therein to complete the work required by the contract for ninety per cent. of the contract price, the remaining ten

per cent. to be the profit of the Cowardin Co. They also agreed to reimburse the Cowardin Co. for their expenditures aforesaid, to assume responsibility for all supplies already contracted for, to lend them $10,000 in cash, and to place $50,000 in the hands of two trustees to be expended in the purchase of further supplies for the construction work; the trustees holding title thereto as a guaranty that May and Jekyll would perform the contract.

May and Jekyll desired to abandon the performance of the contract, on or before August 25, 1903, and one Dean, who afterwards took out the charter of the Sand Filtration Corporation of
56 America, desired to undertake the further execution of the original contract. A new agreement was entered into between the Cowardin Co. and May and Jekyll on August 25, 1903, in which it was agreed that the former contract be cancelled, and in consideration May and Jekyll sold and delivered to the Cowardin Co. all of the supplies, implements, personal property and so forth, including not only that purchased from the Cowardin Co. under the contract of May 25, 1903, but also all that had been purchased by the trustees with the $50,000 as provided in said contract. The Cowardin Co. also agreeing to assume and to procure the assumption by any parties undertaking the work, of certain liabilities of May and Jekyll as contained in exhibit A thereto attached; and they agreed further to convey all of the property on hand as per schedule B to trustees to secure the payment of the aforesaid liabilities in schedule A. The last clause of said contract reads as follows:

"5. Inasmuch as the parties of the second part have heretofore advanced to the parties of the first part the sum of Ten thousand dollars ($10,000) under the eighth paragraph of said contract of May 26th, 1903, and there now remains due to the parties hereto of the second part Eight thousand dollars ($8,000) thereof, Two thousand dollars having been paid thereon, the parties of the first part hereby covenant and agree to repay the parties of the second part, or to their order, the said sum of Eight thousand dollars ($8,000) out of the net profits which may be realized by the parties of the first part from the construction or erection of that portion of said filtration plant which they have contracted with the United States to construct or erect. The said Eight thousand dollars ($8,000), if the same shall not sooner be voluntarily paid by the parties of the first part to the parties of the second part shall be reserved and paid out of the ten per cent. of the contract price for said work which will be reserved to the United States; and if the parties of the first part shall not themselves continue said work under their contract with the United States or shall procure some third party or parties to
57 perform the same, or if the same shall be performed by any person or persons on behalf of the parties hereto of the first part, appropriate provision shall be made for the reservation and payment of said Eight thousand — ($8,000) to the parties hereto of the second part; it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the Eight thousand dollars ($8,000) shall be under the contingency that the parties of the first part shall realize a profit under said contract with

the United States, and not otherwise; and that if any profit shall be so realized by them, it shall be subjected to the payment of the said Eight thousand dollars ($8,000), or so much thereof as said profits will pay and satisfy."

(Cowardin Co. are the parties of the first part, and May and Jekyll of the second).

On the same day Cowardin Co. and Henry B. Dean, trading under name of Dean and Shibley, entered into an agreement for the completion of the contract. This instrument recited the contract of the Cowardin Co. with the Government for the construction of the filtration plant; the construction plant as set forth in schedule B. aforesaid, as then in hands of Cowardin Co.; that the Cowardin Co. is financially unable to proceed with the work, and it is in condition warranting the appointment of a receiver; the contract with May and Jekyll of August 25, 1903, cancelling the former contract between them and the Cowardin Co., and the agreement of Dean to assume the obligations of the Cowardin Co. thereunder; and that Dean and Shibley were then organizing the Filtration Corporation which would undertake the completion of the contract under an arrangement to be made with the receiver when appointed. In consideration of the promises of Dean, the Cowardin Co. conveyed to him all of the articles of construction plant specified in the exhibits, together with all that had been acquired from May and Jekyll and the trustees aforesaid. This was subject to the following conditions: First,
58 that one John D. Maclennon of Cleveland Ohio, shall be appointed receiver of the Cowardin Co., by a court of competent jurisdiction, which shall authorize the prosecution of the work under this contract, and the employment therein of the Sand Filtration Corporation; Second, that a contract shall be made between said receiver and the Sand Filtration Corporation by which the latter shall be employed to complete the contract with the United States, and shall receive all payments under said contract save such as shall be required to pay the costs and expenses of said receivership. The Sand Filtration Corporation shall execute a bond for $150,000 conditioned for the complete performance of the contract with the Government, and the payment of all claims for labor and material. That upon the execution of said contract and bond the title to the construction plant aforesaid shall pass to and be vested in said Sand Filtration Corporation.

The fourth clause of this contract reads as follows:

"Fourth. As consideration for the construction plant by this instrument acquired by the grantee, or the Sand Filtration Company of America, the grantee until the said Sand Filtration Company of America has been organized and substituted and thereafter the said last named company, assume and agree to pay all the debts of May and Jekyll specified in Schedule B hereto attached and a part hereof, when and as they or it may arrange with the several creditors, and in general to comply with the provisions and conditions of one certain agreement entered into between the grantors and said May and Jekyll, a copy of which is hereto attached and to be read as a part hereof, including among other provisions the payment of the sum of

$8,000 to the said May and Jekyll as in said agreement is provided, and the payment of which is also assumed by the said grantee; and also to pay to the receiver the sum of $65,000, to be distributed thereafter as the court may direct, which said sum of $65,000 shall become due and payable as follows: the sum of $10,000 on September 15th, 1903, $15,000 on January 15th, 1904, $10,000 on March 15th, 1904, $10,000 on May 15th, 1904, and the remaining $20,-
59 000 on the completion of the said filtration plant and at the time of the final payment thereon by the United States; and the said grantee, and the Sand Filtration Company of America, when said company shall have been substituted for the said grantee, shall also pay to the grantors or their attorney for them the sum of $3,517.50—said sum having been paid by the grantors on account of pay roll and other expenses since the commencement of negotiation between the parties hereto, and further to pay all other expenses and obligations necessary to be incurred between the date of this contract and the execution of the formal contract with the receiver hereafter to be appointed for the grantors.

"It is further agreed that all expenses, costs and fees of receivership and of the cause in which the receiver is appointed are to be borne by the grantors, or to be defrayed by the receiver out of the funds which may come into his hands for them."

The provisions in regard to the receiver and the contract with him were necessary to the protection of the Filtration Corporation, because there could be no direct assignment of a government contract. It appears that all of the foregoing conditions were performed, and the property delivered to the Filtration Corporation which completed the work required by the contract.

On said 25th day of August, 1903, a supplemental agreement was signed by the Cowardin Co. authorizing the receiver to deduct from the money received from the Government the said sums of $65,000 and $8,000, and pay the same directly to the said Cowardin Co., instead of first paying the same to the Filtration Co., and receiving the same back from it.

The proceeding leading up to the decree appealed from was begun by a petition filed by the Cowardin Co. on March 13, 1906, for a rule to the receiver. This petition recited the facts of the case generally, and alleged that of the last payment made by the Government to the receiver, on the completion of the contract, there remained in the hands of the receiver the sum of $18,000, which he with-
60 held at the demand of the Sand Filtration Co., and an order for its payment was prayed. The several parties in interest answered the petition. The Sand Filtration Corporation claimed that the sum of $1190 should be retained from the money due Cowardin Co. because of a mistake of that amount in the schedule of property delivered, which they called a "duplication of assets." It denied liability for the $8,000 to May and Jekyll because no profits had been realized from the contract; and that the contract had been completed by the Filtration Co. at a loss of $100,000.

An interlocutory order was passed April 3, 1906, requiring the receiver to pay over to the Cowardin Co. $8,000, out of the $10,000

fund, reserving the sum of $2,000 until the coming in of the Auditor's report. And the Court being further of the opinion that the Cowardin Co. had made a profit under their contract with the Government, within the intent and meaning of the contract between them and May and Jekyll, but being unable to determine from the then state of the record whether there was an error of $1190 arising from a duplication in the schedule of the assets of May and Jekyll turned over by them to the Cowardin Co., and by the latter to the Sand Filtration Corporation, the matter of that determination was referred to the Auditor with power to take testimony, etc.

Testimony having been taken before the Auditor, the latter reported at length denying the claim of the duplication of said assets.

The Sand Filtration Corporation excepted to the Auditor's report. These exceptions were overruled and the report confirmed on October 8, 1906; and a final decree was passed directing the receiver to pay to May and Jekyll the sum of $8,000, and to the Cowardin Co. the said sum of $2,000 reserved by the order of reference to the Auditor. The Sand Filtration Corporation has appealed from the final decree.

The Auditor's report contains a careful review of the testimony produced before him, relating to the alleged duplication of
61 assets in the transfer of construction plant and material from the Cowardin Co. and May and Jekyll to the Sand Filtration Corporation, and a well reasoned conclusion against the contention of the latter.

It appears that schedules were carefully prepared, and referred to in the several contracts, showing each item of construction plant and material that was finally delivered to the Sand Filtration Corporation; and that the same were verified by the latter's financial expert. The books and accounts of all parties were open to inspection, and the mistake, if it occurred, passed unnoticed. No question in respect of it seems to have been raised until nearly three years thereafter, when the time for final settlement arrived. Under these conditions the Filtration Corporation assumed a heavy burden in attempting to show that a mistake had been made in some one of the items of the schedules. Without adding anything to the Auditor's discussion of the evidence, we agree with him that the showing made was insufficient, and with the Court in confirming his report.

As regards the $8,000 payment ordered to be made to May and Jeykll, the contention is, first, that the obligation of the contract of the appellant with the Cowardin Co. was to pay said sum in the event only that the appellant should make a profit in carrying out the contract. In this connection, it is conceded that the appellant instead of making a profit, actually sustained a loss considerably greater than that amount.

The second contention, in case of the denial of the first, is, that no profit was made in the transaction by the Cowardin Co. The contract by the Cowardin Co., which the appellants assumed, with Jekyll and May, was to pay them the $8,000 out of the net profits which the Cowardin Co. might realize from the construction of that portion of the filtration works which they had contracted for with the United

States. In contemplation of that contract, the Filtration Corporation, on the same day, assumed the performance of the contract of the Cowardin Co., and in consideration thereof and of the
62 construction plant derived from May and Jekyll through the Cowardin Co., agreed to pay the said sum of $8,000 to May and Jekyll as well as the sum of $65,000 for the said plant which was then and there received. There was no condition in this contract making that payment dependent upon the making of a profit by the Filtration Co. in the transaction; nor is there any language used from which such a condition can be inferred. The fact that the Filtration Co. undertook the completion of the contract at all, indicates its certain expectation of profit in the transaction, and if it feared that the expected profit would not exceed the $8,000 payment assumed, it was its duty to protect itself in that particular by some express stipulation to that effect. Having failed to so provide, May and Jekyll, who furnished a consideration for the undertaking and have also sustained a substantial loss, cannot be made to bear the consequences of the failure of those expectations.

The Court was right also in holding that the Cowardin Co. derived net profits of more than $8,000 from their contract with the Government. May and Jekyll not only repaid them every dollar of their original outlay—$15,000, in round numbers—but also turned over to them $50,000 worth of additional construction plant and material that had been purchased by them. In the new contract with the Filtration Corporation, the latter assumed the complete performance of the Government contract for the money payable thereunder, and made performance secure by the exacted bond in the sum of $150,000. The Filtration Corporation, in order to secure this contract, took over the plant which had been relinquished by May and Jekyll to the Cowardin Co. at the agreed price of $65,000, payments of which in installments were required to be deducted from the Government's payments by the receiver and paid to the Cowardin Co. Notwithstanding the losses of May and Jekyll on the one hand, and the Filtration Corporation on the other, the Cowardin Co. realized a net profit of say $65000. Without
63 one dollar of actual expenditure in the performance of their contract with the Government, so far as the record shows, they secured its performance by others, and received the sum of $65,000 for the plant mainly derived from May and Jekyll who gave it up in order to be released from their first contract.

Had the Cowardin Co. not contracted the plant to the Filtration Corporation, but, after securing the final performance of the Government contract by the latter, had sold the plant to others, the amount received therefor would have been a net gain. Its character as gain or net profit was not changed by selling the plant to the Filtration Corporation. Having made this net profit, the liability of the Cowardin Co., assumed by the Filtration Corporation, became fixed and enforceable.

The Court rendered the proper decree under the facts presented by the record, and it will, therefore, be affirmed with costs. It is so ordered.

Affirmed.

64 TUESDAY, *May 7th, A. D.* 1907.

No. 1746, April Term, 1907.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR B. JEKYLL.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.
May 7, 1907.

TUESDAY *May 21st*, A. D. 1907.

No. 1746.

THE SAND FILTRATION CORPORATION OF AMERICA, Appellant,
vs.
SAMUEL P. COWARDIN, JAMES F. BRADLEY, SYDNEY P. CLAY and THOMAS E. STAGG, and ROBERT H. MAY, GEORGE E. JEKYLL, and ARTHUR B. JEKYLL.

On motion of Mr. C. L. Frailey, of counsel for the appellant in the above entitled cause, It is ordered by the Court that said appellant be allowed an appeal to the Supreme Court of the United States,
and the bond to act as supersedeas is fixed at the sum of
65 fifteen thousand dollars, and the bond for costs at the sum
of three hundred dollars; and it is further ordered that the mandate in said cause be stayed until further order.

66 (*Bond on Appeal.*)

Know all Men by these Presents, That we, The Sand Filtration Corporation of America, as principal, and the National Surety Company, a corporation organized and existing under the laws of the State of New York, and having an office and principal place of Business at 115 Broadway, as surety, are held and firmly bound unto Samuel P. Cowardin, James F. Bradley, Sydney P. Clay and Thomas E. Stagg, and Robert H. May, George E. Jekyll, and Arthur B. Jekyll in the full and just sum of Fifteen thousand ($15,000.00) dollars, to be paid to the said Samuel P. Cowardin, James F. Bradley,

Sydney P. Clay and Thomas E. Stagg, and Robert H. May, George E. Jekyll and Arthur B. Jekyll, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of May, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between The Sand Filtration Corporation of America, appellant, and Samuel P. Cowardin and others appellees, and numbered 1746 on the general docket of said Court of Appeals, a decree was rendered against the said The Sand Filtration Corporation of America and the said The Sand Filtration Corporation of America having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Samuel P. Cowardin, James F. Bradley, Sydney P. Clay and Thomas E. Stagg and Robert H. May, George E. Jekyll and Arthur B. Jekyll citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said the Sand Filtration Corporation of America shall prosecute said appeal to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE SAND FILTRATION CORPORATION
OF AMERICA.
HENRY B. DEAN, *President.* [SEAL.]

[Seal of The Sand Filtration Corporation.]

NATIONAL SURETY COMPANY,
By WILLIAM J. GRIFFIN, *Vice Pres.* [SEAL.]

[Seal of National Surety Company.]

Attest:
E. CASHION,
Res. Ass't Sec.

Sealed and delivered in presence of—
HENRY J. O'BRIEN,
Secretary Pro Tem.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1746. The Sand Filtration Corporation of America, appellant, *vs.* Samuel P. Cowardin *et al.* Supersedeas Bond on appeal to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed June 10, 1907. Henry W. Hodges, Clerk.

67 UNITED STATES OF AMERICA, *ss:*

To Samuel P. Cowardin, James F. Bradley, Sydney P. Clay and Thomas E. Stagg, and Robert H. May, George E. Jekyll and Arthur B. Jekyll, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The Sand Filtration Corporation of America is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 10th day of June, in the year of our Lord one thousand nine hundred and seven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
J. J. DARLINGTON,
Att'y for Cowardin, Bradley, Clay & Stagg.
TUCKER AND KENYON,
REGINALD S. HUIDEKOPER,
Att'ys for May & Jekyll.
June 11, 1907.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun- 11, 1907. Henry W. Hodges, Clerk.

68 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 67 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Sand Filtration Corporation of America, Appellant, *vs.* Samuel P. Cowardin, James F. Bradley, Sidney P. Clay, and Thomas E. Stagg, and Robert H. May, George E. Jekyll, and Arthur B. Jekyll, No. 1746, April Term, 1907, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 12th day of June, A. D. 1907.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,782. District of Columbia Court of Appeals. Term No. 123. The Sand Filtration Corporation of America, appellant, *vs.* Samuel P. Cowardin, James F. Bradley, Sydney P. Clay *et al.* Filed July 8, 1907. File No. 20,782.